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Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1781

WILLARD E. ROBERTSON,
Petitioner,

versus

CLAY L. SHAW
(EDWARD F. WEGMANN, EXECUTOR),
Respondent

PETITION FOR CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

No.

WILLARD E. ROBERTSON,
Petitioner,

versus

CLAY L. SHAW
(EDWARD F. WEGMANN, EXECUTOR),
Respondent

PETITION FOR CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Willard E. Robertson, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit in No. 75-2091, rendered on January 24, 1977 (rehearing denied, June 20, 1977), affirming the judgment of the District Court denying defendants' motion to dismiss this action for damages under 42 USC 1983 for the reason that it had abated with plaintiff's death.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 545 F2d 980, and is reproduced as Appendix A, p. 14; and the order of the Fifth Circuit denying the application for rehearing is reproduced as Appendix C, p. 30. The decision of the United States District Court for the Eastern District of Louisiana, reported at 391 F.Supp. 1353, appears as Appendix D, p. 32.

JURISDICTION

The opinion and judgment of the Court of Appeals was entered on January 24, 1977, and the order denying the request for rehearing was entered on June 20, 1977. The jurisdiction of this Court is invoked under 28 USC 1254(1).

QUESTIONS PRESENTED

The novel and important questions of law presented are:

1 — May a federal court, in determining whether an action under §1983 of the Civil Rights Act survives the death of the plaintiff, refuse to follow the dictates of §1988 of that Act which provides that — inasmuch as the Civil Rights Act does not make any provision with respect to survival of actions under §1983 — the court shall look to, and be governed by, the law of the State in which the case is pending, and instead, judicially create a new "federal common law" of absolute survivorship, merely because the explicit law of the State provides for survival of such actions for personal damages only in favor of certain designated beneficiaries, none of whom was left by the deceased plaintiff?

2 — Can the decision of the court below be allowed to stand when there has never been in existence any federal common law of survivorship of civil actions — to the contrary, the long-standing rule of common law being

that an action abated with the death of the injured party — and there is no real authority for the federal court now to create a federal common law of survivorship of an action under §1983 of the Civil Rights Act when Congress itself did not see fit legislatively to ameliorate the existing rule, except by enacting §1988 of the Civil Rights Act to incorporate as federal law the state law of survivorship currently existing in the forum?

STATUTES INVOLVED

42 USC 1983, and Louisiana's survivorship statute, Civil Code Article 2315, are reproduced as Appendix E, pp. 71-72. The central issue of this petition turns on 42 USC 1988 which provides:

"The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of

the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty."

STATEMENT OF THE CASE

Clay L. Shaw brought this action against Jim Garrison and others, including petitioner,[1] asserting a claim for damages under §1983 of the Civil Rights Act (42 USC 1983) by reason of his having been prosecuted for conspiracy to assassinate President Kennedy and, subsequently, for perjury charges growing out of the original prosecution. The court's jurisdiction was invoked pursuant to 28 USC 1331 and 1343.

While the action below was pending, plaintiff Shaw died. He was survived by neither spouse, parent, child, brother or sister, nor any other dependent kin. The only person now having an interest in the damages claimed in this action is plaintiff's sole residuary legatee, a friend. However, the district court, over the objection of defendants, entered an *ex parte* order, permitting the executor of Shaw's estate to be substituted as the plaintiff in this action.

Defendants moved to dismiss the action on the ground that it has been extinguished by Shaw's death, because under the law of Louisiana (Louisiana Civil

1 The defendants-appellants below were Jim Garrison, the District Attorney for the Parish of Orleans at the time the action was filed; three private citizens, including petitioner Willard E. Robertson; and an asserted member of Garrison's staff. Only Robertson is petitioning for certiorari, but petitioner believes that all other parties below have an "interest in the outcome of the petition" (U.S.Sup.Ct. Rule 21, par. 4).

Code, Article 2315), which must be extended to and govern this case under the dictates of §1988 of the Civil Rights Act, there is no party in whose favor the right of recovery legally survives.

The lower court denied the motions, and on defendants' interlocutory appeal, the Fifth Circuit affirmed. The appellate court recognized that all parties are in agreement, and accepted the holding of the lower court, that under the law of Louisiana, plaintiff's claim under §1983 would have abated, since an action for damages for personal injuries, such as the instant one, survives the death of the plaintiff only in favor of certain designated beneficiaries customarily recognized as dependent relatives — those having a close family tie to a deceased plaintiff — that is, his spouse, children, parents or siblings. *Shaw vs Garrison*, 545 F2d 980, 982 (CA 5-1977); Appendix A, p. 16.

While conceding that it must look to the law of Louisiana under §1988 of the Civil Rights Act, the court held, however, that inasmuch as the law of Louisiana does not provide for survival of this particular action, since plaintiff Shaw did not leave any of the designated familial beneficiaries, it was "inconsistent", not with the "laws of the United States", but with the "policy" or "purposes" of the Civil Rights Act and would be rejected. 545 F2d at 983; Appendix, pp. 19-20. The Fifth Circuit, like the district court, then formulated a new "federal common law" of absolute survivorship of civil rights actions under §1983 when none had existed before. 545 F2d at p. 984 *et seq.*; Appendix, p. 22 *et seq.*

REASONS FOR ALLOWING THE WRIT

1 — *The Decision Below Is In Conflict With Decisions Of Four Circuits All Applying State Laws Of Survivorship, As Well As With Principles Stated By This Court In* Moor *And With The Fifth Circuit's Own Earlier Decision In* Brazier

Certiorari should be granted to review the Court's holding below that, despite the express dictate of §1988 of the Civil Rights Act, the "policy" of the Act sanctions the federal court's ignoring the law of the forum state which permits survival only in favor of designated familial beneficiaries and its creation of a "federal common law" permitting survival of an action under §1983 in favor of the estate for the benefit of the decedent's friend named as residuary legatee, because such holding is in conflict with decisions of four other circuits which recognized that the state laws of survivorship should be applied under §1988 [*Pritchard vs Smith*, 289 F2d 153 (CA 8-1961); *Spence vs Staras*, 507 F2d 554 (CA 7-1974); *Hall vs Wooten*, 506 F2d 564 (1974); and *Dean vs Shirer*, 547 F2d 227 (CA 4-1976)], as well as principles enunciated by this Court in *Moor vs County of Alameda*, 411 US 693 (1973), and by the Fifth Circuit in its own earlier decision in *Brazier vs Cherry*, 293 F2d 401 (CA 5-1961).

In *Pritchard*, 289 F2d 153 (CA 8-1961), the Eighth Circuit, noting that §1983 does not specifically treat with the survival issue and that under §1988, resort should be had to state law, held "that the court should look to the Arkansas law to determine the survival issue here present". Since the Court found the action to be one for

"wrongs to the person other than libel and slander", it survived under the Arkansas law. 289 F2d at p. 158.

The decision of the Fifth Circuit below is diametrically opposed to that of the Seventh Circuit in *Spence vs Staras*, 507 F2d 554 (CA 7-1974), which stated emphatically that "in a federal civil rights action where the person who has been deprived of his rights has died, the action survives for the benefit of the estate if the applicable state law creates such a survival action" (p. 557).[2] While sustaining the representative action as surviving under Illinois law, the court dismissed plaintiff's individual action since it did not survive under the state law.

Although the Court below quoted from this Court's decision in *Moor vs Alameda*, 411 US 693 (1973) (see 545 F2d at 982; Appendix, p. 20), the Fifth Circuit's decision is actually in conflict with the principles stated in *Moor* that "§1988 instructs federal courts as to what law to apply in causes of actions arising under federal civil rights acts" (p. 703), and that "although Congress may have assigned to the process of judicial implication the task of selecting in any particular case appropriate rules from state law to supplement established federal law, the application of that process is restricted to those contexts in which Congress has in fact authorized resort to state and common law" (p. 701).

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2 The Court cited with approval not only the *Brazier* case, but also *Evain vs Conlisk*, 364 F.Supp. 1188, 1191 (ND Ill.-1973), aff'd 498 F2d 1403 (CA 7-1974), and *Holmes vs Silver Cross Hosp.*, 340 F.Supp. 125, 129 (ND Ill.-1972), in both of which latter two cases, the courts dismissed the actions since under the applicable state law, they did not survive.

The decision of the Fifth Circuit below is also actually in conflict with its own prior decision in *Brazier vs Cherry*, 293 F2d 401 (CA 5-1962), deemed presently to be the leading case on the question of survivorship under §1983 by application of state law as dictated by §1988. In that case, the Fifth Circuit, speaking through Chief Judge Brown, held that any "amelioration of the harshness of the principle (the long- and well-established common law rule of abatement of actions upon death of the injured person) must come from legislation" (p. 403), and "that Congress adopted *as federal law* the currently effective state law on the general right of survival. This was done by §1988" (p. 405 — emphasis supplied). See also *Wolfer vs Thaler*, 525 F2d 977 (CA 5-1976), fn. 1 at p. 978.

In *Hall vs Wooten*, 506 F2d 564 (CA 6-1974), the Sixth Circuit — much like the Fifth Circuit in *Brazier*, but contrary to the court below — held that, "following section 1988", the court must "look to state law in fashioning federal common law", and that "we adopt *as federal common law, the law of Kentucky, the forum state*, which provides for the survival of actions for personal injury (quoting the state statute). Since none of the exceptions (that is, actions for slander, libel, criminal conversion and malicious prosecution) is applicable here, we hold that the cause of action alleged in this case survived the death of the injured person" (p. 569 — emphasis supplied).[3]

3 The Fifth Circuit's creation of a federal common law of survival in favor of any and all representatives of a decedent not only flies in the face of the Sixth Circuit's ruling in *Hall* that federal common law is to be derived from the applicable state statute, but also conflicts with all federal survival statutes. See pp. 9-10, and 12, *infra*.

In the recent case of *Dean vs Shirer*, 547 F2d 227 (CA 4-1976),[4] the Fourth Circuit carefully analyzed plaintiff's §1983 claim to determine if it survived under the laws of South Carolina, which it obviously acknowledged as governing the disposition of the case. The court applied the state statute which does not provide for absolute survival, but for survival of only certain types of action. After quoting the South Carolina statute involved, the Fourth Circuit stated that "exceptions to such survivorability of actions for personal injuries are actions for malicious prosecution, slander, fraud and deceit" (547 F2d at 229).

The Fourth Circuit thus recognized that if Dean's action had been in the nature of one for malicious prosecution, slander, fraud or deceit, it would not have survived. Only the appellate court's categorization of the action as one for false imprisonment or assault allowed it to survive.

In the instant case, there is no question that Shaw's action is of the category which would survive under the law of Louisiana only if Shaw would have left a wife, child, father, mother, brother or sister. Because Shaw was not survived by any such designated familial beneficiaries, the law of Louisiana — like the federal survivorship laws, such as the Federal Employers' Liability Act, the Jones Act, the Longshoremen's and Harbor Workers' Act, the Death on the High Seas Act, and even §1986 of the Civil

4 Although *Dean* was actually decided before *Shaw*, it was not published until after the decision below and was not considered by the Fifth Circuit.

Rights Act[5] — dictates that his action does not survive. The Fifth Circuit — contrary to the court in *Dean* — refused, however, to apply the state law, and held that the result mandated by 42 USC 1988 was undesirable, and hence avoidable through the creation of a federal common law entirely contrary to all recognized legal tenets.

The rejection of Louisiana's survivorship law by the Fifth Circuit in the case at bar effectively removes the mandate of §1988 of the Civil Rights Act and replaces that statute with a federal common law rule of absolute survivorship.

The holding below, conflicting in theory, principle and statutory application with the holdings of four other circuit courts, as well as this Court's decision in *Moor* and the Fifth Circuit's own prior decision in *Brazier*, and with §1988 of the Civil Rights Act, should be reviewed by this Court to resolve such conflicts.

2 — Survivorship Of An Action Brought Under §1983 Of The Civil Rights Act Is A Question Of Utmost Importance Which Has Not Been, But Should Be, Settled By This Court

Because the Fifth Circuit concedes that plaintiff's action would abate under Louisiana law, but goes on to

5 The Federal Employer's Liability Act, 45 USC 51, *et seq.*; Jones Act, 46 USC 688; Longshoremen's and Harbor Workers' Compensation Act, 33 USC 908-909; Death on the High Seas Act, 46 USC 761, *et seq.*; Civil Rights Act, 42 USC 1985-1986, governing actions for acts of "invidious discrimination" [*Griffin vs Breckenridge*, 403 US 88 (1971)].

formulate a federal common law rule of absolute survivorship, this case provides a perfect vehicle for this Court to consider whether or not courts will continue to look to state laws of survivorship as provided in 42 USC 1988 or, by means of judicial legislation, completely bypass such analysis and permit absolute survivorship under "federal common law".

The importance of this issue is apparent when the effect of the Fifth Circuit's decision is considered: by judicial fiat of the court below, rather than by legislative action, §1988 has been written out of the Civil Rights Act in favor of a federal common law of absolute survivorship. Further, that result draws into question the value of all previous decisions based on applicable state statutes, which decisions all contain careful analyses of the causes of action, and/or classes of beneficiaries who have standing to pursue actions, under state survivorship statutes.[6]

The holding below represents such a drastic departure from all previous decisions on the issue, that it should be reviewed by the Supreme Court. Moreover, a writ of certiorari should be granted by this Court to settle the meaning of an essential section (§1988) of this important Act of Congress, the Civil Rights Act.

Finally, even conceding for the purposes of this consideration only, that federal common law, and not

6 See *e. g., Pritchard vs Smith*, 289 F2d 153 (CA 8-1961); *Brazier vs Cherry*, 293 F2d 401 (CA 5-1961); *Spence vs Staras*, 507 F2d 554 (CA 7-1974); *Hall vs Wooten*, 506 F2d 564 (CA 6-1974); *Dean vs Shirer*, 547 F2d 227 (CA 4-1976); *Wolfer vs Thaler*, 525 F2d 977 (CA 5-1976); *Holmes vs Silver Cross Hosp.*, 340 F.Supp. 125 (ND Ill.-1972); *Evain vs Conlisk*, 364 F.Supp. 1188 (ND Ill.-1973), aff'd 498 F2d 1403 (CA 7-1974).

state law through application of §1988, should govern the survivorship of actions under §1983, certiorari should be granted to determine the overriding national issue as to what such federal common law should be.

It is submitted that there is no basis whatsoever for a federal common law of absolute survivorship as formulated by the court below, but that in formulating any such federal common law, the federal courts should be persuaded, if not bound, by the various federal laws of survival, including §1986 of the Civil Rights Act,[7] all of which, whether relating to wrongful injury actions or wrongful death actions, are explicit "in the naming of dependent relatives who may recover and in (providing) the priority given to their claims" [*Moragne vs States Marine Lines, Inc.*, 398 US 375, 407 (1970)].

In sum, this case encompasses questions of exceptional importance as to the construction and application of the Civil Rights Act, including the abrogation of §1988 itself resulting from the holding below, and the right of a court, by judicial fiat, to create an absolute survivorship of actions under the Civil Rights Act, despite the fact that Congress itself had refused to do so and that the long-established common law, both federal and state, did not recognize survivorship of any such personal claims of an injured party.

"This Court has never addressed these issues" [*cf.* dissent. *Jones vs Hildebrandt*, 45 LW 4703 (June 16, 1977), at 4705], and should do so in this case.

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7 *Supra*, fn. 5.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for certiorari should be granted.

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APPENDIX

APPENDIX A

Clay L. SHAW, Plaintiff-Appellee,

v.

Jim GARRISON et al.,
Defendants-Appellants.

No. 75-2019.

United States Court of Appeals,
Fifth Circuit.

Jan. 24, 1977.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before WISDOM and INGRAHAM, Circuit Judges, and GROOMS,* District Judge.

WISDOM, Circuit Judge:

This case, before us on an interlocutory appeal, 28 U.S.C. § 1292(b), arises from an investigation conducted by the then district attorney of Orleans Parish, Jim Garrison, concerning the assassination of President John F. Kennedy and the prosecution of Clay Shaw for conspiring to assassinate President Kennedy. It presents a novel question of law: Does an action a plaintiff institutes under 42 U.S.C. § 1983 survive his death despite the fact that the claim would abate under state law? We agree with the district court that it does survive and we borrow liberally from Judge Fred J. R. Heebe's reasoning in his opinion reported at 391 F.Supp. 1353.

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* Senior District Judge for the Northern District of Alabama, sitting by designation.

I.

There is no need to recite the Kafkaesque facts in this case which the district judge characterized as "one of the most bizarre episodes in American political and legal history." 391 F.Supp. 1353. In addition to the district court's adequate discussion, 391 F.Supp. 1353, 1356-58, the factual background is fully set out in a related case, *Shaw v. Garrison,* 1971, E.D.La., 328 F.Supp. 390, *aff'd* 5 Cir. 1972, 467 F.2d 113, *cert. denied* 1972, 409 U.S. 1024, 93 S.Ct. 467, 34 L.Ed.2d 317. It suffices here to note that Shaw, through his executor, charges that District Attorney Garrison and the other named defendants, certain citizens of New Orleans, deprived him of his civil rights by improperly linking him with the Kennedy assassination and by conducting, as well as financing, a publicized investigation and prosecution of him for his alleged role in that national tragedy. The question presently before us arises because Shaw died after he initiated this § 1983 action but before the matter was ever brought to trial.

Upon his death on August 15, 1974, Shaw was not survived by a spouse, children, parents, or siblings. Under Louisiana law, the applicable state law if state law is applicable, pending actions for personal damages survive only in favor of certain classes of beneficiaries named in La.Civ.Code Art. 2315.[1] *See J.*

1 *Art. 2315. Liability for acts causing damage; survival of action*

Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.

The right to recover damages to property caused by an offense or quasi offense is a property right which, on the death of the obligee, is inherited by his legal, instituted, or irregular heirs, subject to the community rights of the surviving spouse.

The right to recover all other damages caused by an offense or quasi offense, if the injured person dies, shall survive for a period of one year from the death of the deceased in favor of: (1) the surviving spouse and child or children of the deceased, or either such spouse or such child or children; (2) the surviving father and mother of the deceased, or either of them, if he left no spouse or child surviving; and (3) the surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child, or parent surviving. The survivors in whose favor this right of action survives may also recover the damages which they sustained through the wrongful death of the deceased. A right to recover damages under the provisions of this paragraph is a property right which, on the death of the survivor in whose favor the right of action survived, is inherited by his legal, instituted, or irregular heirs, whether suit has been instituted thereon by the survivor or not.

As used in this article, the words "child", "brother", "sister", "father", and "mother" include a child, brother, sister, father, and mother, by adoption, respectively.

Wilton Jones Co. v. Liberty Mutual Insurance Co., Ct.App.1971, 248 So.2d 878, *writ denied,* 259 La. 61, 249 So.2d 202, cited with apparent approval in *Austrum v. City of Baton Rouge,* 1973 La., 282 So.2d 434. Under Louisiana law, because Shaw has no statutory survivors an executor is a proper survivor only to actions for property damage. All parties agree that if Louisiana law applies, Shaw's § 1983 claim abates.[2]

We observe at the outset that Fed.R.Civ.P. 25(a)(1)[3] does not resolve the question what law of survival of

2 Whether this suit could properly be deemed an action for damage to property because of the costs Shaw incurred in defending himself and the losses he suffered as a direct result of his prosecution was vigorously contested below and decided in the negative. Because this holding by the district court has not been appealed, we intimate no view on the issue.

3 *Rule 25. Substitution of Parties.*

(a) Death.

(1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the de-

actions should be applied in this case. That rule simply describes the *manner* in which parties are to be substituted in federal court once it is determined that the applicable substantive law allows the action to survive a party's death. *Ransom v. Brennan*, 5 Cir. 1971, 437 F.2d 513, 520, *cert. denied*, 1971, 403 U.S. 904, 91 S.Ct. 2205, 29 L.Ed.2d 680; 3B Moore's Federal Practice ¶ 25.04[1], at 121; Note, 44 Fordham L.Rev. 666, 667-68 (1975). This Court has previously determined that Art. 2315 of the La.Civil Code is substantive rather than procedural and consequently that "it does not clash with Rule 25(a)." *Roberson v. N.V. Stoomvaart Maatschappij*, 5 Cir. 1975, 507 F.2d 994, 996. We must look to the civil rights statutes themselves to determine whether Louisiana's law of survival must be applied to this action.

"Properly viewed . . . [42 U.S.C.] § 1988 instructs federal courts as to what law to apply in causes of action arising under federal civil rights acts." *Moor v. County of Alameda*, 1973, 411 U.S. 693, 703, 93 S.Ct. 1785, 1792, 36 L.Ed.2d 596. That section provides:

> "The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity

ceased party and, together with the notice of hearing, shall be served on the parties in the manner provided in Rule 4 for the service of a summons, and may be served in any judicial district. Unless the motion for substitution is made not later than 90 days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party.

> with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the [*sic* — see p. 3, *supra*, for phrase omitted from quotation] United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty."

In effect, § 1988 sets forth a three step process for determining the applicable substantive law in civil rights cases. First, the Court must decide whether the Civil Rights Acts are "deficient" in furnishing a remedy for the vindication of a plaintiff's civil rights. If this inquiry is answered affirmatively, we are then directed to look to state law to fill the interstices in the federal provisions. Finally, if there is state law available to fill the gap in the federal statutes, we must insure that the state law is not inconsistent with federal statutory and constitutional law.

This Court has already determined that the civil rights statutes are deficient with respect to survivorship. *Brazier v. Cherry*, 5 Cir. 1961, 293 F.2d 401, 408, *cert. denied*, 1961, 368 U.S. 921, 82 S.Ct. 243, 7 L.Ed.2d 136. Other courts, including the Supreme Court, have reached the same conclusion. *Moor v. County of Alameda*, 1973, 411 U.S. 693, 702, n. 14, 93

S.Ct. 1785, 36 L.Ed.2d 596, *Pritchard v. Smith*, 8 Cir. 1961, 289 F.2d 153, 155. We therefore must apply Louisiana's survivorship law unless that law "is inconsistent with the Constitution and laws of the United States."

In analyzing whether La.Civ. Code Ann. art. 2315 is incompatible with federal law, it is important to clarify the type of action we are dealing with. As the district court stressed:

> "We emphasize at the outset that we are not concerned with wrongful death actions for damages to others caused by the tort victim's death. Also to be distinguished are survival of causes of action, where the tort victim dies without bringing suit, and the question is whether a party may *institute* suit to recover for the tort victim's own damages."

391 F.Supp. at 1361 (emphasis in original). Instead, we are concerned with a *pending* action for damages, instituted by a plaintiff on his own behalf *before* his death, seeking damages to redress a violation of his civil rights.[4] Moreover, we are dealing with a situation in which the application of the relevant state survival law to a federal cause of action will leave the plaintiff without a remedy in either federal or state courts. See *Moragne v. State Marine Lines*, 1970, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339. This we refuse to do. Because Louisiana's survivorship provisions would cause

4 This is therefore not an attempt to sue under the civil rights statutes for deprivation of another's constitutional rights. Such suits are impermissible. *O'Malley v. Brierley*, 3 Cir. 1973, 477 F.2d 785; *Brown v. Board of Trustees of LaGrange Independent School Dist.*, 5 Cir. 1951, 187 F.2d 20.

Shaw's pending civil rights action to abate, we find that Louisiana law is inconsistent with the broad remedial purposes embodied in the Civil Rights Acts — laws designed to insure to all citizens "the right to be free from deprivation of constitutional civil rights." *Brazier v. Cherry*, 293 F.2d at 409. We therefore decline to apply Louisiana law of survival. As the Supreme Court said in *Moor v. County of Alameda*, "[§ 1988] expressly limits the authority granted federal courts to look to the common law, as modified by state law, to instances in which that law 'is not inconsistent with the Constitution and laws of the United States.' " 411 U.S. at 706, 93 S.Ct. at 1794. The phrase "laws of the United States" must be read to encompass the civil rights statutes. It would be specious reasoning at best to suggest that Congress was concerned about the possibility that in enforcing the civil rights statutes, state law inconsistent with tangential federal law might be relied upon, but was not concerned about the possibility of hostile state law interfering with carrying out the purposes of the Civil Rights Acts themselves. See *Monroe v. Pape*, 1960, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492.

Where state law has proved to be an unsuitable vehicle to provide the relief envisioned by § 1983, federal courts have looked beyond the inhospitable law. In *Pierson v. Ray*, 1967, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288, the Supreme Court held that consent to an injury is not a defense available under § 1983 regardless of its availability under state law. Similarly, the Second Circuit rejected the contention that "all state officials in suits brought under § 1983 enjoy an immunity similar to that they might enjoy in suits under state law", noting that such a holding "would prac-

tically constitute a judicial repeal of the Civil Rights Acts." *Jobson v. Henne*, 2 Cir. 1966, 355 F.2d 129, 133. For over 60 years this Court has said that the statute of limitations applicable to § 1983 actions is determined by state law.[5] Nevertheless, we refused to apply a ten day state statute of limitations to an action brought under § 1983 because the "aims [of the civil rights statutes] would be seriously curtailed, if not completely frustrated . . . if a state could, in effect, modify this important act of Congress, by limiting litigants to court action within ten days . . ." *Franklin v. City of Marks*, 5 Cir. 1971, 439 F.2d 665, 669. In sum, as one commentator has concluded:

> "Generally, state statutes have been considered only for the beneficial effect they would have on the plaintiff's case. If the federal policy in favor of the protection of civil rights is a strong one, as the federal courts frequently insist, then local concerns reflected in state statutes that stand to bar or diminish plaintiff's chances of recovery will likely give way."

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5 *O'Sullivan v. Felix*, 1914, 233 U.S. 318, 34 S.Ct. 596, 58 L.Ed. 980; *Shaw v. McCorkle*, 5 Cir. 1976, 537 F.2d 1289. *See* Note, A Limitation on Action for Deprivations of Federal Rights, 68 Colum.L.Rev. 763 (1968). We agree with Judge Heebe below that the fact that state statutes of limitation apply to federal civil rights actions

> in no way undercuts our decision today for there is a significant distinction between statutes of limitation and those restricting survival of causes of action. Statutes of limitation merely regulate the permissible time for filing suit: so long as the applicable period is clear, a plaintiff can assure himself of filing a timely action. However, statutes regulating survival may, as the Louisiana statute would here, entirely bar plaintiffs from ever filing suit. Thus the hardship worked by the latter type of statute is much more severe.

391 F.Supp. at 1366 n. 19.

Theis, *Shaw v. Garrison*, Some Observations On 42 U.S.C. § 1988 And Federal Common Law, 36 La.L.Rev. 681, 688 (1976).

II.

Because Louisiana law is unsuitable, and therefore unavailable, to remedy § 1983's deficiency with respect to survival, we hold that Shaw's action survives in favor of his estate as a matter of federal common law. Federal common law is alive and well and living in the federal judicial system.[6] Federal courts will recognize federal common law when it is necessary to carry out the congressional objectives of federal legislation. *J. I. Case v. Borak*, 1964, 377 U.S. 426, 84 S.Ct. 1555, 12 L.Ed.2d 423; *Textile Workers v. Lincoln Mills*, 1957, 353 U.S. 448, 77 S.Ct. 912, 1 L.Ed.2d 972. In *Lefton v. City of Hattiesburg*, 5 Cir. 1964, 333 F.2d 280, this Court commented upon the duty of the federal courts to use their common law powers to advance the purposes of the civil rights statutes.

> "In civil rights cases ... Congress has directed the federal courts to use that combination of federal law, common law, and state law as will be best 'adapted to the object' of the civil rights laws. . . . Therefore a federal court is required to use common law powers to facilitate and not to hinder, '[p]roceedings in vindication of civil rights.' "

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6 *See* P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System (2d ed. 1973); Friendly, In Praise of Erie — And of the New Federal Common Law, 39 N.Y.U.L.Rev. 383 (1964); Note, Choice of Law under Section 1983, 37 U.Chi.L.Rev. 494 (1970); Note, The Federal Common Law, 82 Harv.L.Rev. 1512 (1969).

333 F.2d at 284.

Our utilization of federal common law to allow Shaw's action to survive in the face of hostile state law furthers the policy voiced in *Lefton*, and is consistent with the Supreme Court's decision in *Sullivan v. Little Hunting Park, Inc.*, 1969, 396 U.S. 229, 90 S.Ct. 400, 24 L.Ed.2d 386. The Supreme Court there recognized the broad remedial policies underlying the civil rights statutes and held

> "that both federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal [civil rights] statutes. *Cf. Brazier v. Cherry*, 293 F.2d 401. The rule of damages, whether drawn from federal or state sources, *is a federal rule* responsive to the need whenever a federal right is impaired."

(Emphasis added.) 396 U.S. at 240, 90 S.Ct. at 406. We see little difference between the development of federal law to allow for maximum damage recovery under the Civil Rights Acts and the formulation of federal law to allow a previously instituted civil rights action to survive in favor of the injured party's estate. Both results follow from the "well settled [principle] that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Bell v. Hood*, 1946, 327 U.S. 678, 684, 66 S.Ct. 773, 777, 90 L.Ed. 939.

Moreover, adoption of a federal rule of survival is desirable because it fosters the uniform application of

the civil rights laws. *Basista v. Weir*, 3 Cir. 1965, 340 F.2d 74; *Nelson v. Knox*, 6 Cir. 1958, 256 F.2d 312 (Stewart, J.). In *Basista*, the court refused to apply a Pennsylvania damage rule that prohibited the award of punitive damages without actual damages. The court observed:

> "We believe that the benefits of the [Civil Rights] Acts were intended to be uniform throughout the United States, that the protection to the individual to be afforded by them was not intended by Congress to differ from state to state, and that the amount of damages to be recovered by the injured individual was not to vary because of the law of the state in which the federal court suit was brought. Federal common law must be applied to effect uniformity, otherwise the Civil Rights Acts would fail to effect the purposes and ends which Congress intended."

340 F.2d at 86. Were we to look only to the state law of survival, Shaw's instant action would survive in four of the states in this Circuit — Florida, Georgia, Mississippi, and Texas — and abate in two — Alabama and Louisiana.[7] Such divergent results are not a justifiable product of a federal statute promulgated to insure the availability of redress for the deprivation of federally protected civil rights.

The marked tendency of the federal courts to allow actions to survive in other areas of particular federal

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7 Code of Ala. Title 7, § 150; Fla.Stat.Ann. § 46.021; Ga.Code Ann. § 3-505; La.Civ.Code Ann. Art. 2315; Miss.Code Ann. § 91-7-233; Vernon's Tex.Civ.Stat.Ann. Art. 5525.

concern further compels our result here. As this Court observed in *Brazier v. Cherry*, 5 Cir. 1961, 293 F.2d 401,

> "At every turn the Supreme Court, by drawing on available state legislation or giving a broad liberal effect to federal statutes has found a way to make compensation effective despite statutory language which might have made non-survival plausible, if not probable, during an earlier era."

293 F.2d at 406. This trend is most evident in maritime law, where the Supreme Court, with little or no statutory authorization has held that Jones Act actions survive both the death of the tortfeasor, *Cox v. Roth*, 1954, 348 U.S. 207, 75 S.Ct. 242, 99 L.Ed. 260, and the death of the beneficiary in a wrongful death action, *Van Beeck v. Sabine Towing Co.*, 1936, 300 U.S. 342, 57 S.Ct. 452, 81 L.Ed. 685, and has used state law to allow a general admiralty action for damages to survive, *Just v. Chambers*, 1941, 312 U.S. 383, 61 S.Ct. 687, 85 L.Ed. 903. This Circuit has applied federal common law to allow an action for injury caused by unseaworthiness to survive the plaintiff's death despite the fact that the suit would not have survived under Article 2315 of the Louisiana Civil Code. *Roberson v. N. V. Stoomvaart Maatschappij*, 5 Cir. 1975, 507 F.2d 994.

The willingness of the federal courts to permit federal actions to survive where statutory guidance on the matter is lacking has not been limited to admiralty suits. Private anti-trust actions have been held to survive both the death of the plaintiff, *Barnes Coal Corp. v. Retail Coal Merchants' Ass'n*, 4 Cir. 1942,

128 F.2d 645, and the death of the defendant, *Rogers v. Douglas Tobacco Board of Trade*, 5 Cir. 1957, 244 F.2d 471; and it has been held under the FELA that the death of a deceased railroad worker's father did not cause the father's survival action for his son's injuries under 45 U.S.C. § 59 to abate, even though the father was the only available person for whose benefit a survival action could be maintained under the terms of 45 U.S.C. § 59. *Dellaripa v. New York, New Haven & Hartford R. Co.*, 2 Cir. 1958, 257 F.2d 733.

The appellants point out that other federal statutes specifically providing for the survival of actions — the FELA, 45 U.S.C. § 59, the Jones Act, 46 U.S.C. § 688, and the Longshoremen's and Harbor Workers' Compensation Act [LHWCA] 33 U.S.C. § 908 — limit the class of beneficiaries that can bring the action to those bearing some close blood or familial relationship to the deceased.[8] This fact, however, does not require us to reach a similar result here for two reasons. First, and most obviously, the limitations put on the survival of actions under those statutes were placed there by Congress; no such constraints confine the granting of relief under § 1983. *Brazier v. Cherry*, at 403-404. Second, those statutes are strictly compensatory in nature; the civil rights statutes, on the other hand, were designed to serve both deterrent as well as com-

8 The FELA, 45 U.S.C. § 59, permits survival of the decedent's wrongful injury action for the benefit of the surviving widow and children, parents, and next of kin dependent on the decedent. The Jones Act, 46 U.S.C. § 688, incorporates the FELA provision by reference. The Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 908 provides that in the event of the death of an employee receiving compensation for permanent partial disability, the total unpaid amount of the award is payable to the surviving widow, child, and dependent grandchildren, brothers, sisters, and other persons who satisfy the definition of the term dependent in 26 U.S.C. § 152.

pensatory purposes. This difference in underlying policy is evidenced by the fact that while punitive damages are available under § 1983 even absent a showing of special or actual damages, *Basista v. Weir*, 3 Cir. 1965, 340 F.2d 74, punitive damages are not available under the terms of the LHWCA, 33 U.S.C. § 908, or under the FELA, 45 U.S.C. § 59, *Kozar v. Chesapeake and Ohio Railway Co.*, 6 Cir. 1971, 449 F.2d 1238, and there is some question as to whether and when they are available under the Jones Act, 46 U.S.C. § 688. *See Phillip v. United States Lines Co.*, 3 Cir. 1966, 355 F.2d 25, *Mpiliris v. Hellenic Lines, Ltd.*, 1970, S.D. Tex., 323 F.Supp. 865, *aff'd* 5 Cir. 1971, 440 F.2d 1163.

In civil rights cases, the federal courts have followed the trend towards allowing federal causes of action to survive. Under § 1988, state survival statutes have primarily been considered when their effect on the plaintiff's case was beneficial, allowing the action to survive either the death of the injured plaintiff, *Hall v. Wooten*, 6 Cir. 1974, 506 F.2d 564; *Brazier v. Cherry*, 5 Cir. 1961, 293 F.2d 401; *Javits v. Stevens*, 1974, S.D.N.Y., 382 F.Supp. 131; *Perkins v. Salafia*, 1972, D.Conn., 338 F.Supp. 1325, or the death of the defendant wrongdoer, *Pritchard v. Smith*, 8 Cir. 1961, 289 F.2d 153. However, as the district court correctly pointed out:

> "The Seventh Circuit, in commenting upon *Brazier v. Cherry, supra*, noted that the result allowing survival of the cause of action had a firm basis in federal law and policy quite apart from any reference to § 1988. The Court of Appeals pointed out that '[w]hile many of the comments contained in these cases concerning the nature of Section 1988 are well

> considered, the decisions do not necessarily depend upon that statute'. *Baker v. F & F Investment*, 420 F 2d 1191, 1196 n. 7 (7th Cir. 1970). [*cert denied*, 1970, 400 U.S. 821, 91 S.Ct. 40, 27 L.Ed.2d 49]"

391 F.Supp. at 1366. The Sixth Circuit's recent decision and reasoning in *Hall v. Wooten* is consistent with the Seventh Circuit's observations about § 1983 survival decisions in *Baker*. In *Hall* the court held "that under federal common law, actions for personal injury . . . survive". 506 F.2d at 569. Because, however, the court went on to "adopt as federal common law, the law of Kentucky, the forum state, which provides for the survival of actions for personal injury", 506 F.2d at 569, it is unclear whether the court was relying upon § 1988's directive to look to consistent state law, or creating an independent federal common law rule of survival for § 1983 actions.

The formulation of such a rule was not essential to allowing the plaintiff's action in *Hall* to survive and permitting a full vindication of his civil rights. It is crucial here. We therefore hold that as a matter of federal common law, a § 1983 action instituted by a plaintiff prior to his death survives in favor of his estate.

APPENDIX B

United States Court of Appeals
For the Fifth Circuit

No. 75-2019

D. C. Docket No. CA-70-466 "B"

CLAY L. SHAW,
Plaintiff-Appellee,
versus

JIM GARRISON, ET AL.,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Louisiana

Before WISDOM and INGRAHAM, Circuit Judges, and GROOMS,* District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment

* Senior District Judge for the Northern District of Alabama, sitting by designation.

of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendants-appellants pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

January 24, 1977

Issued as Mandate:

APPENDIX C

United States Court of Appeals
Fifth Circuit — Office of the Clerk

June 20, 1977

TO ALL PARTIES LISTED BELOW:

No. 75-2019 — Clay L. Shaw v. Jim Garrison, Et Al.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition for rehearing en banc has also been denied.*

* on behalf of Willard E. Robertson, Et Al.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
EDWARD W. WADSWORTH,
Clerk

/s/ BRENDA M. HAUCK
Deputy Clerk

cc: Messrs. Malcolm W. Monroe
Michael L. Goldblatt
Mr. Peter J. Butler
Mr. Jim Garrison
Mr. Joseph M. Rault, Jr.
Mr. F. Irvin Dymond
Mr. Edward F. Wegmann
Messrs. William J. Wegmann
Salvatore Panzeca

APPENDIX D

Clay L. SHAW

v.

Jim GARRISON et al.

Civ. A. No. 70-466.

United States District Court,
E. D. Louisiana.

March 4, 1975.

HEEBE, Chief Judge:

We write today yet another chapter in what is undoubtedly one of the most bizarre episodes in American political and legal history. The matter before this Court arises out of the well publicized investigation conducted by then District Attorney of Orleans Parish, Jim Garrison, concerning the assassination of President John F. Kennedy on November 22, 1963.

The instant case is a civil action for damages brought by plaintiff Clay L. Shaw against Garrison and others with whom he allegedly conspired to deprive plaintiff of his civil rights by prosecuting him in bad faith for conspiracy to assassinate President Kennedy and for perjury charges growing out of the original prosecution. The complaint was filed in February 1970 and alleges causes of action under the

federal civil rights statutes, 42 U.S.C. §§ 1983,[1] 1985,[2] 1986.[3] The Court's jurisdiction is invoked pursuant to

1 42 U.S.C. § 1983:
"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

2 42 U.S.C. § 1985 provides in pertinent part:
"(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;
"(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

3 42 U.S.C. § 1986:
"Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in

28 U.S.C. § 1343, the jurisdictional counterpart of the civil rights statutes, and 28 U.S.C. § 1331.

In the more than five years from the date of filing of the complaint to the present, this case has yet to go to trial. Substantial discovery has been conducted and answers to interrogatories have been filed by plaintiff as well as four of the six defendants. Trial had been set for November 4, 1974.

On August 15, 1974, Clay Shaw died. He was survived by neither spouse, children, parents, nor siblings. On October 3, 1974, the Court granted the motion of Edward F. Wegmann, Executor of Shaw's last will, to be substituted as plaintiff in place of Shaw, pursuant to Rule 25(a) of the Federal Rules of Civil Procedure. Defendants Rault, Shilstone, Robertson, and Fatter have now brought two motions before the Court: (1) a motion to dismiss for abatement of the claim upon Shaw's death; and (2) a motion to dismiss the cause of action under 42 U.S.C. §§ 1985 and 1986 for failure to state a claim upon which relief can be granted.

All parties initially directed their arguments on the abatement issue solely to the proper disposition required under state law. The Court requested additional briefs, which the parties have filed, addressed to the question of whether this Court can, and should, apply a federal common law of survival in civil rights actions, and deferred decision on both motions pending receipt of those briefs. We conclude that the matter would abate under the state law of Louisiana. However, for reasons discussed below the Court finds that it is not bound by state law. After considering the

purposes underlying the federal civil rights statutes, the development of the laws of survival and abatement in the federal courts and the fifty states, and the necessity in cases such as this to fully effectuate the broad remedial goals of these federal statutes, it is the conclusion of this Court that federal common law requires that this pending action survive in favor of the executor of decedent's last will. Finally, we agree with the defendants that the plaintiff has not stated a cause of action under 42 U.S.C. §§ 1985 and 1986, and we grant their motion to dismiss as to those claims.[4]

I. The Allegations of the Complaint

For purposes of determining a motion to dismiss, all the allegations of the complaint must be taken as true. These allegations are substantially the same as the facts found and set out at length in a related case, Shaw v. Garrison, 328 F.Supp. 390 (E.D.La. 1971), aff'd 467

preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued."

4 The motion to dismiss for failure to state a claim under 42 U.S.C. §§ 1985, 1986 brought by defendants Rault, Shilstone, Robertson, and Fatter has not been joined in by defendants Garrison and Russo. However, our finding that plaintiff's complaint does not state a cause of action under these statutes is applicable to the latter defendants as well.

F.2d 113 (5th Cir. 1972), in which Judge Herbert W. Christenberry of this court permanently enjoined Garrison and his employees from further prosecuting Shaw in a then pending state criminal action for perjury. Although both questions before this Court are clearly framed legal issues dependent on only a few uncontested facts, we recite plaintiff's allegations in some detail here in order to give a full understanding of the background and present posture of the case.

The matter begins, tragically, with the assassination of President John F. Kennedy in Dallas, Texas, on November 22, 1963. Lee Harvey Oswald was arrested and charged with the crime, but he himself was killed shortly after his arrest. A blue-ribbon panel of distinguished individuals, headed by then Chief Justice of the United States Earl Warren, was appointed by President Lyndon B. Johnson "to ascertain, evaluate and report upon the facts relating to the assassination of the late President John F. Kennedy and the subsequent violent death of the man charged with the assassination." Executive Order No. 11130. The final report of the Warren Commission, consisting of 26 volumes of evidence, concluded that Lee Harvey Oswald was the sole person responsible for the death of President Kennedy. Specifically, the Commission found no evidence of any conspiracy to assassinate President Kennedy.[5]

5 The report stated in part:
"Because of the difficulty of proving negatives to a certainty, the possibility of others being involved with either Oswald or Ruby cannot be established categorically, but if there is any such evidence it has been beyond the reach of all the investigative agencies and resources of the United States and has not come to the attention of the Commission." Report of the President's Commission on the Assassination of President Kennedy, Conclusion 9 (1964).

Plaintiff alleges that during November 1966, defendants entered into a conspiracy among themselves and with others not named as defendants herein to misuse the legal machinery of the State of Louisiana by conducting a fraudulent investigation of the assassination solely for the personal and political aggrandizement of the conspirators, particularly Garrison, Robertson, Rault, and Shilstone. Defendants Robertson, Rault, and Shilstone are connected with the alleged conspiracy primarily through their formation of an organization known as "Truth and Consequences" in the latter part of February 1967, shortly before plaintiff's arrest. The organization was formed to provide financial support for Garrison in the conduct of his investigation. Plaintiff alleges that the three defendants named above were kept aware of the progress of Garrison's investigation and were continually consulted by him. A sum in excess of seventy thousand dollars was provided by the Truth and Consequences organization, substantially all of which was contributed between the dates of Shaw's arrest in March 1967 and his acquittal of the conspiracy charges in March 1969. Further, plaintiff alleges that defendant Robertson provided Garrison with thirty thousand dollars of cash funds for the investigation and further assisted Garrison by employing one of the state's major witnesses, a member of the Dallas police department, prior to and during the conspiracy trial. Portions of the money contributed by Truth and Consequences were used, plaintiff contends, for the procurement of perjured testimony.

Plaintiff was first interviewed by Garrison's staff on December 21, 1966, at the District Attorney's office. He was summoned to the District Attorney's office again

on March 1, 1967, for further questioning. He was arrested later that day, and charged with having participated in a conspiracy to murder President John F. Kennedy. Members of the news media had been alerted to plaintiff's arrest, and when he was led from Garrison's office, the event was fully reported by the media. Shaw could have been taken from the District Attorney's office through a back exit, without having to pass before the gathered media. This was one of numerous incidents alleged by plaintiff which he contends, proves that the major purpose of the investigation was publicity for the investigators, not prosecution of guilty persons.

The main witness against Shaw at the preliminary hearing was defendant Perry Raymond Russo. Russo testified that he had been present at a meeting at which Shaw conspired with Lee Harvey Oswald and one David W. Ferrie[6] to assassinate President Kennedy. This testimony, again according to the allegations of plaintiff in his complaint, was procured by the use of hallucinatory drugs and hypnosis administered by Dr. Esmond A. Fatter, defendant herein, and the late Dr. Nicholas Chetta, Coroner of Orleans Parish, acting under instructions from Garrison. Dr. Fatter placed Russo in an hypnotic trance on at least two occasions during which the hypnotic suggestions were made.

In June of 1967, Lieutenant O'Donnell of the New Orleans Police Department and the Department's polygrapher, acting on instructions from Garrison, attempted to give Russo a lie detector test. The test

6 Ferrie did not testify at the preliminary hearing because he died on February 20, 1967, just prior to plaintiff's arrest.

was not successful. However, during an interview later that day, Russo told O'Donnell that he could not identify Shaw as having been present at the alleged conspiratorial meeting. Garrison was given a written report of this interview with Russo, but never made the report available to plaintiff's counsel.

Trial in the matter began on January 21, 1969, and ended March 1, 1969. At the trial, Russo was unable to identify Shaw as one of the alleged conspirators whom he had previously testified he had heard plotting the assassination of President Kennedy. Plaintiff alleges that because of the O'Donnell report and for other reasons Garrison knew at the time of trial that Russo could not so identify Shaw. He further alleges that the other witnesses who testified against Shaw were equally lacking in credibility and that that fact was known to Garrison.

The trial lasted forty days. At the conclusion of the trial, the jury took only fifty-five minutes to return a unanimous verdict of not guilty.

On Monday, March 3, 1969, the first working day thereafter, Garrison prepared and signed a bill of information charging the plaintiff with two counts of perjury. The basis of the perjury charge was Shaw's testimony at trial that he had never seen nor been acquainted with David W. Ferrie or Lee Harvey Oswald. No other witnesses testifying at Shaw's trial were charged with perjury.

As noted above, Judge Christenberry permanently enjoined defendant Garrison, his agents and employees, from further prosecution of the state per-

jury charge against Shaw. The basis for the court's injunction was a finding that the two prosecutions of Shaw by Garrison were conducted in bad faith. The court determined that the totality of the circumstances made the case fall within the narrow exception to the general rule announced in Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), that the federal courts should not interfere with pending state criminal prosecutions except for the most compelling of reasons. Shaw v. Garrison, 328 F.Supp. 390 (E.D.La.1971), aff'd 467 F.2d 113 (5th Cir. 1972).

II. Non-abatement of the Action

A. Deficiency of the Federal Law

Our analysis begins with a consideration of 42 U.S.C. § 1988:

> "The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; *but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State* wherein the court having jurisdiction of such civil or criminal cause is held, *so far as the same is not*

> *inconsistent with the Constitution and laws of the United States, shall* be extended to and *govern the said courts* in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty." (emphasis added)

There is no general federal statutory law of survival governing civil rights actions.[7] The initial question for decision then is whether this lack of survival makes the federal law "deficient in the provisions necessary to furnish suitable remedies."

A brief consideration of the legislative history behind 42 U.S.C. §§ 1983, 1985 makes clear that its supporters intended that the predecessor of these statutes be construed as broadly as necessary to remedy evils in response to which it was passed. The legislative history is more fully set out in Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). We refer to only a small portion of that extensive debate.

Sections 1983 and 1985 were originally enacted as §§ 1, 2 of the Ku Klux Act of April 20, 1871. The act was passed out of a concern over the widespread lawless activities of the Ku Klux Klan in the South at that time. These activities included not only the intimidation of citizens, but physical violence including murder.[8]

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7 The provisions of 42 U.S.C. § 1986 allow limited damages for the death of any party caused by failure to prevent certain acts actionable under § 1985. See n. 3, *supra*.

8 *See, e.g.*, the remarks of Representative Lowe of Kansas, Cong. Globe, 42d Cong. 1st Sess., App. 166-167, and Representative Beatty of Ohio, *id.* at 374, *quoted in* Monroe v. Pape, *supra* at 175, 81 S.Ct. 473. *See also* the message sent to Congress by President Grant, Cong. Globe, 42d Cong., 1st Sess., p. 244.

In introducing the bill, Representative Shellabarger, Chairman of the House Select Committee which drafted the Ku Klux Act, stated:

> "This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficially construed. . . . [T]he largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people."[9]

Later in the debate, Representative Shellabarger stated:

> "It will be remembered that the second section [now § 1985] gives a civil right of action for injury to person or property, &c; but it gives no right of action where death occurs. I think that is a defect in the second section."[10]

Senator Osborn of Florida commented upon the proper scope of the law:

> "That the State courts in the several States have been unable to enforce the criminal laws of their respective States or to suppress the disorders existing, and in fact that the preservation of life and property in many sections of

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9 Cong. Globe, 42d Cong., 1st Sess., App. p. 68.

10 *Id.*, p. 805.

> the country is beyond the power of the State government, is a sufficient reason why Congress should, so far as they have authority under the Constitution, enact the laws necessary for the protection of citizens of the United States."[11]

Although the bill did not, by its terms, delineate a comprehensive system of remedies, it was not the intention of Congress to deny those remedies to civil rights plaintiffs. Born out of the violence of the Ku Klux Klan activities, the civil rights bill passed by Congress had as its object the effective protection of the rights of all persons. Whatever remedies would give substance to these rights were to be applied.

The courts, in considering the legislative history, have concluded that the failure to provide for survival in the federal civil rights laws is a deficiency in those provisions. The most thorough discussion of the matter is contained in the opinion of the Court of Appeals for the Fifth Circuit in Brazier v. Cherry, 293 F.2d 401 (5th Cir. 1961). That case involved a suit filed under the federal civil rights laws, 42 U.S.C. § 1981 et seq.. by the surviving widow, individually and as administratrix of decedent's estate, against various Georgia police officers, for the allegedly illegal arrest and beating of decedent, which resulted in his death. No suit had been instituted prior to the death of decedent. The Court of Appeals held that since federal law was deficient for failure to provide for survival, Georgia state law, which provided for both survival of the decedent's cause of action and for a wrongful death

11 *Id.*, p. 653, *quoted in* Monroe v. Pape, *supra* at 176, 81 S.Ct. at 478.

action, was to be applied in the federal suit to allow the maintenance of those actions.

The Court of Appeals first rejected defendants' contention that the civil rights statutes, by their language, reflect a purpose that actions under that statute shall not survive. Since § 1983 provides that the violator "shall be liable to the *party injured*" (emphasis added) and § 1985(3) affords a right of action to the "party so injured or deprived," the claim was made that Congress purposefully extended the right to file a civil suit for damages only to the person whose civil rights were violated. In rejecting this contention, the court found a "clear congressional policy to protect the life of the living from the hazard of death caused by unconstitutional deprivations of civil rights . . . ." Brazier v. Cherry, *supra* at 405. It went on to state the purposes of the civil rights statutes concerning survival:

> "[I]t defies history to conclude that Congress purposely meant to assure to the living freedom from such unconstitutional deprivations, but that, with like precision, it means to withdraw the protection of civil rights statutes against the peril of death. The policy of the law and the legislative aim was certainly to protect the security of life and limb as well as property against these actions. Violent injury that would kill was not less prohibited than violence which would cripple." (footnote omitted) *Id.* at 404.[12]

12 The death involved in *Brazier* allegedly was a direct result of the actions of the defendants. In the present case it is not alleged nor has the substituted plaintiff asserted that Clay Shaw's death

The *Brazier* court concluded that "[o]n our analysis federal law is not suitable, i. e., sufficient, since it leaves a gap for death in a substantive policy making no distinction beween violent injury and violent death." *Id.* at 408.

Every court that has considered the matter has found, either explicitly or by implication, that the lack of survival provisions in the federal civil rights laws is such a deficiency. *E.g.*, Brazier v. Cherry, *supra;* Pritchard v. Smith, 289 F.2d 153 (8th Cir. 1961); Evain v. Conlisk, 364 F.Supp. 1188 (N.D.Ill. 1973), aff'd without opinion 498 F.2d 1403 (7th Cir. 1974); Holmes v. Silver Cross Hospital of Joliet, Illinois, 340 F. Supp. 125 (N.D.Ill.1972); Ambrose v. Wheatley, 321 F.Supp. 1220 (D.Del. 1971); Johnson v. Wilkinson, 315 F.Supp. 773 (W.D.Mo.1970); Salazar v. Dowd, 256 F.Supp. 220 (D.Colo.1966); Galindo v. Brownell, 255 F.Supp. 930 (S.D.Cal.1966). This finding is a prerequisite to the application of state law, for only where the federal laws are deficient may a court look elsewhere to remedy the deficiency. Thus, even those courts which have concluded after considering the applicable state law that such law does not provide for survival of a particular action, *e.g.*, Evain v. Conlisk, *supra*, must necessarily have first found federal law to be deficient in not providing for survival.

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occurred from causes related to the actions of the defendants herein. We find that this distinction does not warrant any different result from that in *Brazier*. None of the state statutes which provide for survival of causes of action make any distinction between deaths caused by defendants and those which are not. *See* statutes compiled at n. 18, *infra*. The same is true of several federal statutes, *e.g.*, the Federal Employers' Liability Act, 45 U.S.C. § 59, and the Jones Act, 46 U.S.C. § 688, incorporating the provisions of the FELA by reference. *But see* the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 909.

Having concluded that a deficiency exists, we look first to the state law of Louisiana to furnish a suitable remedy.

B. State Law

We are called upon to determine whether Louisiana law provides that a pending action for damages for violation of plaintiff's civil rights survives the death of the plaintiff in favor of the administrator of his estate. We emphasize at the outset that we are not concerned with wrongful death actions for damages to others caused by the tort victim's death. Also to be distinguished are survival of causes of action, where the tort victim dies without bringing suit, and the question is whether a party may *institute* suit to recover for the tort victim's own damages. In the case at bar, Clay Shaw had already brought suit against the defendants more than four years prior to his death. The question before us is technically one of abatement *vel non* of a pending action.

Article 428 of the Louisiana Code of Civil Procedure (C.C.P.) provides:

> "An action does not abate on the death of a party. The only exception to this rule is an action to enforce a right or obligation which is strictly personal."

If this were the only relevant provision, then the decision would be easy. It would turn simply on whether this civil rights action is an action to enforce a right or obligation which is strictly personal. However, two other provisions of the Louisiana codes

complicate the matter considerably. Article 2315 of the Louisiana Civil Code[13] and Article 801 of the Code of Civil Procedure[14] define the proper beneficiaries to inherit the action and both articles contemplate separate requirements for survival depending on the nature of the damages suffered: if the suit is one for damages to property, substitution by the succession representative is proper; if the suit is one for any other kind of damages, only the certain named classes of beneficiaries may be substituted.

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13 Louisiana Civil Code art. 2315:
"Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.
"The right to recover damages to property caused by an offense or quasi offense is a property right which, on the death of the obligee, is inherited by his legal, instituted, or irregular heirs, subject to the community rights of the surviving spouse.
"The right to recover all other damages caused by an offense or quasi offense, if the injured person dies, shall survive for a period of one year from the death of the deceased in favor of: (1) the surviving spouse and child or children of the deceased, or either such spouse or such child or children; (2) the surviving father and mother of the deceased, or either of them, if he left no spouse or child surviving; and (3) the surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child, or parent surviving. The survivors in whose favor this right of action survives may also recover the damages which they sustained through the wrongful death of the deceased. A right to recover damages under the provisions of this paragraph is a property right which, on the death of the survivor in whose favor the right of action survived, is inherited by his legal, instituted, or irregular heirs, whether suit has been instituted thereon by the survivor or not.
"As used in this article, the words 'child', 'brother', 'sister,' 'father', and 'mother' include a child, brother, sister, father, and mother, by adoption, respectively."

14 C.C.P. art. 801:
"When a party dies during the pendency of an action which is not extinguished by his death, his legal successor may have himself substituted for the deceased party, on ex parte written motion supported by proof of his quality.
"As used in Articles 801 through 804, 'legal successor' means:
"(1) The survivors designated in Article 2315 of the Civil Code, if the action survives in their favor; and
(2) Otherwise, it means the succession representative . . . or the heirs and legatees of the deceased."

Seeking to avoid the strictures of the latter, Shaw's executor contends that his suit is, at least in part, one to recover damages to property. He asserts that Shaw's estate was deprived of income which Shaw could have earned had he not been preoccupied with defending the criminal charges against him; that he had to pay attorneys' fees and investigative expenses; that he could not attend to his real property because of the demands on his time, and its value thus lessened, and in sum that, "it is his estate, which his testamentary executor represents, that suffered great property damage." (Plaintiff's brief, p. 7).

These assertions hardly need be taken seriously. They amount to no more than the incidental hardships common to any litigation. If these damages allegedly suffered represent damages to property, then any suit filed may be twisted in the same way to fit within this pigeonhole. The crux of this civil rights action is for damages arising out of personal injuries. It bears not the slightest resemblance to a suit which seeks to recover damages to real or personal property.

The more serious question is whether the provisions of Article 2315 limiting survival to only named classes of beneficiaries in cases of non-property damage apply to pending actions as well as actions not yet instituted. The leading case on the subject is J. Wilton Jones Co. v. Liberty Mutual Ins. Co., 248 So.2d 878 (La.App.1971), writ den., 259 La. 61, 249 So.2d 202 (1971), decided by a divided court on rehearing en banc.

The case involved a suit for damages for personal injuries sustained in an automobile accident. One of

the two original plaintiffs died some eighteen months after suit had been filed, but prior to trial. Within one year's time from plaintiff's death, his widow filed a petition as "administratrix of decedent's succession" claiming that, as administratrix, she was entitled to be substituted in the action, and she prayed for judgment in favor of the estate. Subsequently, more than one year after her husband's death, she filed a second petition seeking both survival and wrongful death benefits in her own behalf.[15] The time periods involved are important because Art. 2315 provides that the right to recover in favor of the named classes of beneficiaries survives only for a period of one year from the death of the deceased. If the time restrictions applied to instituted actions and the administratrix was not a proper party to sue, the widow would not recover because her substitution in the action as widow occurred after the one-year period had run.

Faced with this problem, the court found a "radical difference" between an action not yet instituted and the substitution of parties in an instituted action. *Id.* 248 So.2d at 891. The court held that only an action not yet instituted is subject to the time requirements of Art. 2315. Once an action has been instituted either by the victim or by survivors and it does not abate under Art. 428, the timeliness of substitution is governed only by the five-year inaction abandonment rule of C.C.P. art. 561.[16] Thus, in the *Jones* case, substitution was timely and the action survived.

15 The wrongful death claim was subsequently withdrawn.

16 Article 561 states in pertinent part:
"An action is abandoned when the parties fail to take any steps in its prosecution or defense in the trial court for a period of five years."

One might reasonably expect that this distinction between instituted actions and not-yet-instituted causes of action would be applied in determining the proper parties for substitution, as well as the timeliness of substitution. But that is not the holding of *Jones*.

After reviewing the statutory history of Article 2315 and related provisions, the court concluded, at 891:

> "As long as art. 2315 spoke of the 'right of this action' surviving in favor of designated beneficiaries, it might have been concluded that an *instituted action* was not governed by a provision dealing with a right of action (or right *to institute the action*). See Gabriel v. United Theatres, La.App. 1951, 50 So.2d 514 (reversed, 221 La. 219, 59 So.2d 127).
>
> "Today art. 2315 provides, instead, that the 'right to recover' survives in favor of the designated beneficiaries.
>
> "In our opinion the present language provides (at least if designated beneficiaries do survive) for the devolution of the victim's claim, even where he has instituted an action, to the survivors designated by art. 2315. The 'right to recover' belongs to them, and not to the succession of the victim nor to his heirs as such." (emphasis in original)

The emphasis which the court gives to this statutory change is somewhat questionable, since the statute still twice refers to the "right of action" in addition to its references to the "right to recover." The original

panel decision took note of this fact and reasoned that since "right of action" does not refer to instituted actions, Art. 2315 in its entirety governs only the survival of causes of action where suit had not been filed prior to decedent's death. Where suit had already been filed, the inheritance of the action is governed by the provisions of C.C.P. arts. 421 and 426, and the succession articles of the Civil Code. Thus, the panel concluded, the restrictions concerning in whose favor the right to recover survives do not apply to an already instituted action.

The *en banc* court clearly rejected this line of argument, although without fully enunciating their reasons for doing so. The only member of the *en banc* court still adhering to the panel's initial opinion was Judge LeSueur, the author of that opinion. The prevailing opinion of the *en banc* court rejected the panel's conclusion as did the other concurring judge. Moreover, the four remaining judges, while dissenting from the result of the majority concerning timeliness of the widow's substitution, each held that the right to recover damages for injuries to a deceased plaintiff is limited to the Art. 2315 beneficiaries, whether suit had been instituted prior to decedent's death or not.

The case was cited with apparent approval by the Louisiana Supreme Court in Austrum v. City of Baton Rouge, 282 So.2d 434, 439 (La.1973). *See also* McBeth v. United Press International, Inc., 505 F.2d 959 (5th Cir., 1974).

We have discussed the reasoning of the court in Jones v. Liberty Mutual Ins. Co., *supra*, in some detail

only to show that the question of the applicability of Art. 2315 to instituted actions was squarely considered and decided by the state appellate court. Whether the failure of that court to draw a distinction between pending actions and causes of action not yet instituted for purposes of substitution of parties is sound is of no concern to this Court. Although we are determining state law pursuant to 42 U.S.C. § 1988 and not sitting as an *Erie* court, the teaching of Erie R. R. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), applies equally well here. In interpreting state law, we are bound by the construction put on it by the state courts, whether we agree with the reasoning upon which that construction is based or not. *See* Delta Air Lines v. McDonnell Douglas Corp., 503 F.2d 239 (5th Cir., 1974). An analysis of Jones v. Liberty Mutual Ins. Co., *supra*, makes clear that under state law pending actions for non-property damages do not survive in favor of decedent's personal representative. With that, our responsibility for determining state law ends.

C. Inconsistency of State Law with Federal Law

Under § 1988, a federal court must not apply state law if it is "inconsistent with the Constitution and laws of the United States." Surely, if Louisiana law did not provide for survival of any tort actions, this Court would have no difficulty in holding that the state law was inconsistent with § 1983 because the state law directly contravened the policy of the civil rights laws, which, as discussed above, favors survival. However, in actions such as this for other than property damage, Louisiana law allows survival in favor of certain classes of close relatives; it does not provide for survival of this particular action because Clay

Shaw was not survived by any member of these classes. We find this policy of limiting the classes of persons in favor of whom an action survives equally inconsistent with the federal civil rights laws.

We distinguish at the outset the creation of actions for wrongful death. These are actions for damages suffered by the beneficiary for loss of love and affection of the deceased. As such, they logically must be limited to certain close relatives of the deceased. Thus, under the Federal Employers' Liability Act, 45 U.S.C. § 51, and the Jones Act, 46 U.S.C. § 688, which incorporates the former provisions by reference, wrongful death actions are created for the benefit of the surviving widow and children, parents and next of kin dependent on the employee; under the Death on the High Seas Act, 46 U.S.C. § 761, for the benefit of the decedent's wife, husband, parent, child, or dependent relative; and under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq., "death benefits" in favor of surviving widow, child, and dependent grandchildren, siblings and certain other dependent persons. State statutes follow a similar pattern. *See also* Moragne v. States Marine Lines, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970).

Where the question is one of survival, however, there is no corresponding need to limit the classes of beneficiaries because the measure of damages are those suffered by the deceased. This is the position taken by all of the 49 other states. While the state laws

differ as to what types of causes of action survive,[17] they are unanimous in providing that those actions which do not abate survive in favor of and against the personal representatives of the deceased.[18]

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17 Some of the state statutes provide for survival of all causes of action, *e.g.*, Ark. Stat. Ann. § 27-901 (repl.ed.1962), Fla.Stat.Ann. § 46.021 (1969), Burns' Ind.Ann.Stat. § 2-403 (repl.ed.1967), Mich.Ann.Stat. § 27A.2921 (rev.1962), M.C.L.A. § 600.2921; others omit certain types of cases — *e.g.*, causes of action for libel, slander, or malicious prosecution — from a general rule favoring survival, *e.g.*, Ariz.Rev.Stat.Ann. § 14-3110 (Spec. Pamphlet 1974); Colo.Rev.Stat.Ann. § 153-1-9 (1963); Del.Code Ann. tit. 10 § 3701 (1953); Ohio Rev.Code Ann. § 2311:21 (Baldwin 1971).
It is true that if this action had been brought as one for malicious prosecution in a state court in a state which had the latter type of statute, the action would abate. We do not find it necessary to catalogue the number of states with such a statute because we believe that the underlying nature of a civil rights action if brought in a state court is not relevant for purposes of determining a federal common law of survival. The fact of the matter is that this is not a state action for libel, slander, or malicious prosecution, but a federal action for violation of plaintiff's civil rights. We have already determined that the purposes underlying this statute require that the action not abate, if there is some proper mechanism for survival. The fact that some states may have a different policy for a cause of action based on the same facts yet differently characterized should not be binding on a federal court construing civil rights actions.

18 Ala.Code Ann. tit. 7, § 150 (1960); Alas.Stat.Ann. § 09.55.570 (1962); Ariz.Rev.Stat.Ann. § 14-3110 (Spec. Pamphlet 1974); Ark.Stat.Ann. § 27-901 (repl.ed.1962); Probate Code of California § 573; Colo.Rev.Stat.Ann. § 153-1-9 (1963); Conn.Gen.Stat.Ann. § 52-599 (1958); Del.Code Ann. tit. 10, § 3701 (1953); Fla.Stat.Ann. § 46.021 (1969); Ga.Code Ann. § 3-505 (rev. 1962); Hawaii Rev.Stat. § 634-84 (1968); Idaho Code Ann. § 5-327 (Supp.1974); Ill.Ann.Stat. ch. 3, § 339 (Smith-Hurd 1961), ch. 110, § 54 (Smith-Hurd 1968); Burns' Ind.Ann.Stat. § 2-403 (repl. ed. 1967); Iowa Code Ann. §§ 611.20, 611.22 (1950); Kan.Stat.Ann. §§ 60-225 (Supp.1974), 60-1801 to 60-1802 (1967); Ky.Rev.Stat.Ann. § 411.140 (1969); Me.Rev.Stat.Ann. tit. 18, § 2501 (Supp.1974); Md.Ann.Code CJ § 6-401 (1974); Mass.Ann.Laws ch. 228, §§ 1, 4 (1974); Mich.Stat.Ann. §§ 27A.2921, 27A.5852 (rev.1962), M.C.L.A. §§ 600.2921, 600.5852; Minn.Stat.Ann. §§ 525.43 (1969), 573.01-573.02 (Supp.1974); Miss. Code Ann. § 91-7-233 (1972); Mo.Ann.Stat. §§ 537.020 (Supp.1974), 537-.030 (1953); Mont.Rev.Code Ann. §93-2824 (repl.ed.1964); Neb.Rev.Stat.Ann. §§ 25-1401, 25-1402, 25-1410 (reissue 1964);

The need to provide for survival of federal civil rights actions is particularly acute in cases, such as the one before the Court, in which plaintiff seeks redress for injuries to his character. Because of defendant Garrison's alleged misuse of his office, Shaw was forced to defend himself for a period of almost five years against a charge that he conspired to assassinate the President of the United States. It may be that, at trial, plaintiff will not be able to carry his burden of proving the facts to support his allegations. However, Shaw surely deserves an opportunity to have his day in court and attempt to clear his name, if only posthumously. Since Louisiana law would deny him this opportunity, we hold that it is inconsistent with federal law and should not be applied.

D. Federal Common Law

The results reached so far leave the Court with a dilemma: on the one hand, we have determined that the federal civil rights laws are deficient in their remedies because they make no provision for survival of causes of action; on the other hand, the applicable survival

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Nev.Rev.Stat. § 41.100 (1965); N.H.Rev.Stat.Ann. § 556:9-556:15 (1955); N.J.Stat.Ann. §§ 2A:15-3 (Supp.1974), 2A:15-4 (1952); N.M.Stat.Ann. §§ 21-7-4, 21-7-10 (repl.ed.1970); N.Y.E.P.T.L. § 11-3.2 (McKinney Consol. Laws, c. 17-b, 1967); N.C.Gen'l Stat. Ann. §§ 28-172, 28-175 (repl.ed.1966); N.D.Cent. Code Ann. § 28-01-26.1, R.Civ.P. 25(A) (repl.ed.1974); Ohio Rev. Code Ann. § 2311.21 (Baldwin 1961), R.Civ.P. 25(A) (Baldwin repl.1972); Okla.Stat.Ann. tit. 12, §§ 1052, 1082 (Supp.1974); Ore.Rev.Stat. § 30.075 (1971); Pa.Stat.Ann. tit. 20, §§ 3371, 3373 (Spec.Pamphlet 1972); R.I.Gen'l Laws Ann. §§ 9-1-6, 9-1-7 (reenactment 1969); S.C.Code Ann. §§ 10.209, 10-217 (1962); S.D.Code § 33.0414-1 (Supp.1960); Tenn.Code Ann. §§ 20-602, 20-605 (1955); Utah Code Ann. § 78-11-12 (Supp.1973); Vt.Stat.Ann. tit. 14, §§ 1451-1452 (repl.ed.1974); Va.Code Ann. §§ 8-146 (repl.ed.1958), 8-628.1, Rule 2:16 (Supp.1974); W.Va.Code Ann. § 55-7-8a (1966); Wisc.Stat.Ann. §§ 269.13 (1957), 287.01 (Supp.1974), 895.01 (1966); Wyo.Stat.Ann. §§ 1-26 to 1-28 (1957).

law of Louisiana, the only law which this Court is directed to apply pursuant to 42 U.S.C. § 1988, does not fully compensate for that deficiency. We must thus further consider whether this pending action survives in favor of decedent's personal representative as a matter of federal common law. The question is one of first impression in this Circuit.

Defendants claim that the court has no power to create such a federal common law: § 1988 directs the court to apply federal statutory law and if it is deficient, the court must apply state law currently in effect, if not inconsistent with the federal law. Since neither law provides for survival of the action in this instance, and since it is clear that at old common law any action for personal injury does not survive the death of the injured party, they contend that the action must abate. This contention is not without some support in the case law and in the language of § 1988 itself. However, after a careful consideration of the matter, the Court concludes that this result was not intended by Congress, is not commanded by the holding of any case binding on us, and, most importantly, is contrary to the broad remedial purposes underlying the federal civil rights laws.

Defendants point to language in Brazier v. Cherry, *supra*, which they contend, indicates that state law exclusively is to be used in determining survival. The Court of Appeals stated:

> "Since the federal statutory framework is, in the words of the statute, 'deficient in the provisions necessary to furnish suitable remedies and punish offenses against' that

law and policy, the state law is to be used to the extent that it is currently available to overcome these deficiencies." *Id.* 293 F.2d at 408.

Moreover, in summarizing the "simple, direct, abbreviated test" set out in § 1988, the Fifth Circuit stated that the court first looks to "(a) federal law and if it is found wanting the court must look to (b) state law currently in effect." *Id.* at 409.

We do not find such language dispositive of the question before us. It is undeniable that federal courts are directed by § 1988 to look to state law to provide relief where the federal statute is deficient. But § 1988 nowhere states that the federal court is bound by an inhospitable state law. If anything, the opinion in Brazier v. Cherry, *supra*, supports the opposite conclusion. The entire thrust of the court's opinion is toward finding a means to provide effective remedies. The court states:

> "From a federal standpoint *the only limitation upon the use of such adoptive state legislation, rule or decision is that it is suitable to carry the* [*federal*]*law into effect* because other available direct federal legislation is not adapted to that object or is deficient in furnishing a fully effective redress. Thus § 1988 declares a simple, direct, abbreviated test: what is needed in the particular case under scrutiny to make the civil rights statutes fully effective?" *Id.* (emphasis added)

Here, we have found § 1988 to be inapplicable because the state law is not "suitable to carry the [federal] law into effect." Under the terms of the statute, the state law is "inconsistent with . . . the laws

of the United States" because such law does not provide for survival necessitated by the policies behind the civil rights statutes, and thus need not be applied.

The Seventh Circuit, in commenting upon Brazier v. Cherry, *supra*, noted that the result allowing survival of the cause of action had a firm basis in federal law and policy quite apart from any reference to § 1988. The Court of Appeals pointed out that "[w]hile many of the comments contained in these cases concerning the nature of Section 1988 are well considered, the decisions do not necessarily depend upon that statute." Baker v. F & F Investment, 420 F.2d 1191, 1196 n. 7 (7th Cir. 1970).[19]

Moreover, at least one other federal court in a civil rights action has applied a remedial rule directly contrary to the state law in effect, where no federal statute was applicable. In Basista v. Weir, 340 F.2d 74 (3rd Cir. 1965), the state law of Pennsylvania provided that punitive damages are not recoverable absent a showing of actual damages. The Court of Appeals found that it was not bound by the state law and held that as a matter of federal common law, it is not necessary to prove actual damages in order to recover punitive damages.

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19 Baker v. F & F Investment, *supra*, held that state statutes of limitation apply to federal civil rights actions. This in no way undercuts our decision today for there is a significant distinction between statutes of limitation and those restricting survival of causes of action. Statutes of limitation merely regulate the permissible time for filing suit: so long as the applicable period is clear, a plaintiff can assure himself of filing a timely action. However, statutes regulating survival may, as the Louisiana statute would here, entirely bar plaintiffs from ever filing suit. Thus, the hardship worked by the latter type of statute is much more severe.

The decision of the district court in Evain v. Conlisk, *supra*, relied on by defendants, provides scant support for their position. In *Evain*, the court noted that Illinois law allows survival of a cause of action only in favor of decedent's estate, and thus held that a daughter was prohibited from bringing a civil rights action for the death of her father. That is the precise opposite of the situation here. Where the state statute was in conformity with those of the other states and suit could have been brought by the personal representative of decedent's estate, there was no reason for the federal court to look beyond the state statute.

In the context of the federal civil rights laws, courts have been mindful of the need to produce effective remedies, despite their apparent unavailability under federal statutes. In Sullivan v. Little Hunting Park, 396 U.S. 229, 90 S.Ct. 400, 24 L.Ed.2d 386 (1969), a suit was brought under 42 U.S.C. § 1982 for injunctive relief and monetary damages, by a homeowner who was expelled from a neighborhood recreational corporation because he rented a house in the neighborhood to a black family. The language of § 1982 is declaratory only, and provides for no damages. The Supreme Court held that plaintiff was entitled to compensatory damages under § 1982, finding that "the existence of a statutory right implies the existence of all necessary and appropriate remedies." *Id.* at 239, 90 S.Ct. at 405.

A similarly broad interpretation of the remedies available under a federal cause of action was announced in Bell v. Hood, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946). Holding that the district court has jurisdiction over a complaint seeking damages for

violation of plaintiff's Fourth and Fifth Amendment rights, the Supreme Court stated:

> "[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Id.* at 684, 66 S.Ct. at 777 (footnotes omitted)

Furthermore, although the old common law provided that all actions abate upon the death of the parties, the unmistakable and inexorable trend in the law is toward creation of progressively greater rights of survival, both by statute and by judicial decision. As the Fifth Circuit noted in Brazier v. Cherry, *supra*, 293 F.2d at 406: "[a]t every turn the Supreme Court, by drawing on available state legislation or giving broad liberal effect to federal statutes has found a way to make compensation effective despite statutory language which might have made non-survival plausible, if not probable, during an earlier era." Much of this development has occurred in federal maritime and admiralty law.

In Just v. Chambers, 312 U.S. 383, 61 S.Ct. 687, 85 L.Ed. 903 (1941), the Supreme Court held that a cause of action in admiralty for damages survived the death of the tortfeasor. Although no federal statute provided for survival, and no equivalent of § 1988 existed for ad-

miralty claims, the court held that an admiralty court could call upon the local state law which allowed for survival, at least where the injury in question occurred on navigable waters within the limits of the state. The court rejected the contention that only a federal statute could change the rule of admiralty law that causes of action for personal injury die with the person.

In Cox v. Roth, 348 U.S. 207, 75 S.Ct. 242, 99 L.Ed. 260 (1955), the issue was the survival of a cause of action under the Jones Act, 46 U.S.C. § 688, upon the death of the tortfeasor. As noted above, the Jones Act, in causes of action for death of a seaman, incorporated the provisions of the Federal Employers' Liability Act, 45 U.S.C. § 51 et seq. The court broadly construed the provisions of the latter act to allow survival of the cause of action, despite its recognition that a "literal application of the words of the F.E.L.A. would result in the denial of recovery against the personal representative of the tortfeasor." *Id.* at 209, 75 S.Ct. at 243. To do otherwise would "frustrate the congressional purpose" underlying the Jones Act. *Id.*

Defendants correctly point out that these two cases, while expanding the bases for survival, merely applied some statutory law already enacted. However, their contention that a federal court may allow survival of an action only where a state statute so provides is seriously undercut by two other decisions of the Supreme Court, Van Beeck v. Sabine Towing Co., 300 U.S. 342, 57 S.Ct. 452, 81 L.Ed. 685 (1937), and Moragne v. States Marine Lines, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970).

In Van Beeck v. Sabine Towing Co., *supra*, the Supreme Court held that a wrongful death action filed by a seaman's mother, pursuant to the Jones Act, 46 U.SC. § 688, does not abate with the death of the mother but passes to her estate. The Jones Act, by incorporating the provisions of the Federal Employer's Liability Act for railway employees, 45 U.S.C. § 51, provided a cause of action for wrongful death for the benefit of certain specified kin. However, the Act did not specify any survival of the action upon the death of the beneficiary. The court held that the wrongful death action survived, after considering treatment of similar questions by the several states and lower federal courts.

Most damaging to defendants' argument is the Supreme Court's unanimous decision in Moragne v. States Marine Lines, *supra*.[20] Plaintiff sought to bring a wrongful death action based on unseaworthiness against the owner of a vessel upon which her husband worked. At the time of his death, the vessel was within the navigable waters of the State of Florida. Neither federal statute nor Florida state law provided for a wrongful death action based on the unseaworthiness of a vessel. Moreover, in The Harrisburg, 119 U.S. 199, 7 S.Ct. 140, 30 L.Ed. 358 (1886), the court had previously held that maritime law does not afford a cause of action for wrongful death. The Supreme Court overruled *The Harrisburg* and held that an action does lie under general maritime law for death caused by violation of maritime duties.

While *Moragne* concerns wrongful death actions and the case before us relates to the entirely distinct

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20 Justice Blackman did not participate in the decision.

concept of survival of decedent's actions, *Moragne* stands for the proposition that creation of such remedies is not limited to statutory law. In determining whether to create wrongful death actions under the general maritime law, the court took note of the proliferation of wrongful death statutes under federal and state law:

> "This legislative establishment of policy carries significance beyond the particular scope of each of the statutes involved. The policy thus established has become itself a part of our law, to be given its appropriate weight not only in matters of statutory construction but also in those of decisional law.
>
> . . . .
>
> "This appreciation of the broader role played by legislation in the development of the law reflects the practices of common-law courts from the most ancient times. As Professor Landis has said, 'much of what is ordinarily regarded as "common law" finds it source in legislative enactment.' Landis, *supra*, at 214. *It has always been the duty of the common-law court to perceive the impact of major legislative innovations and to interweave the new legislative policies with the inherited body of common-law principles* — many of them deriving from earlier legislative exertions." Moragne v. States Marine Lines, *supra*, 398 U.S. at 390-392, 90 S.Ct. at 1782. (emphasis added)

The court recognized that every state has enacted a wrongful death statute and that several federal statutes similarly allowed actions for wrongful death. Thus, the court found the creation of a federal common law of wrongful death appropriate, although neither federal statute nor Florida state law had any such provisions.

We thus find no impediment to the creation of a federal common law of survival in civil rights actions in favor of the personal representative of the deceased. To the contrary, such a holding seems required by the policies underlying the civil rights laws and the Supreme Court's treatment of survival of actions in analogous contexts.[21]

III. Failure to State a Claim Under 12 U.S.C. §§ 1985, 1986

The text of 42 U.S.C. § 1985 is set out in footnote 2 of this opinion. Although plaintiff's amended complaint simply refers to the rather lengthy statute as a whole, the language upon which all parties rely is contained in the last clause of § 1985(2) and the first two clauses of § 1985(3). These portions of the statute, in essence, prohibit certain conspiracies with intent by the conspirators to deprive any person of the equal protection of the laws. In Griffin v. Breckenridge, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971), the Supreme Court, interpreting § 1985(3), unanimously held:

21 We add a final note on the implication of the Court's holding upon 42 U.S.C. § 1988. Nothing this Court holds today has any tendency to make § 1988 mere surplusage. We went beyond the dictates of § 1988 to operate a federal common law of survival in this case because the federal policy in favor of this "remedy" is clear and the state laws, except for Louisiana's, overwhelmingly permit personal representatives of the deceased to bring suit where the cause of action survived. We further found a developing federal common law of survival. Where this convergence of factors does not exist, a different result may be required.

"It is thus evident that all indicators — text, companion provisions, and legislative history — point unwaveringly to § 1985(3)'s coverage of private conspiracies. That the statute was meant to reach private action does not, however, mean that it was intended to apply to all tortious, conspiratorial interferences with the rights of others. For, though the supporters of the legislation insisted on coverage of private conspiracies, they were equally emphatic that they did not believe, in the words of Representative Cook, 'that Congress has a right to punish an assault and battery when committed by two or more persons within a State.' *Id.*, at 485. The constitutional shoals that would lie in the path of interpreting § 1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose — by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment. See the remarks of Representatives Willard and Shellabarger, quoted *supra*, at 100 [91 S.Ct. at 1797]. The language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all." (footnotes omitted) *Id.* at 101-02, 91 S.Ct. at 1798.

Thus, a complaint does not state a cause of action under § 1985(3) unless it alleges some racially, or perhaps otherwise class-based, discriminatory intent. There is no need for us to reach the question, expressly reserved by the Supreme Court, Griffin v. Breckenridge, *supra* at 102 n. 9, 91 S.Ct. 1790, whether an invidiously discriminatory intent other than racial bias would be sufficient to state a cause of action under the portions of § 1985(3) at issue here. *Cf.* Cong.Globe, 42d Cong., 1st Sess., 567 (1871) (remarks of Sen. Edmunds). Even assuming that any class-based discriminatory intent is actionable, there is not the slightest evidence of any such intent in the record. There is no evidence in any of the answers to interrogatories filed that Shaw was being prosecuted because he was a member of any identifiable group cognizable by the equal protection clause or otherwise.

Although the Supreme Court in *Griffin* was construing only § 1985(3), there is no reason to believe that the result should be any different with reference to the last clause of § 1985(2). The language under § 1985(2) concerning intent to deprive persons of equal protection of the laws is substantially the same as that under § 1985(3), and should be read the same way. Johnston v. National Broadcasting Company, Inc., 356 F.Supp. 904 (E.D.N.Y. 1973).

The only other portion of § 1985 possibly relevant to the facts of this case is the first clause of § 1985(2):

> "If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness *in any court of the United States* from attending such

court, *or from testifying to any matter pending therein, freely, fully, and truthfully,* as to injure such party or witness in his person or property on account of having so attended or testified, . . . the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators." (emphasis added)

Although none of the parties has specifically relied on this section, the Court has considered it in order to make a proper disposition of defendants' motion to dismiss. At first glance, the provision quoted above appears almost exactly to cover the conduct alleged in the complaint. Moreover, it appears from the construction of the statute that the requirement of intent to deprive persons of the equal protection of the laws may apply only to the second of the two clauses of § 1985(2). If this is so, lack of such discriminatory animus on the part of defendants would not be fatal to plaintiff's cause of action under clause 1.

However, we need not reach this question of whether the intent to deprive of equal protection is a requirement of both clauses. Upon a closer reading of the provision it is clear that it prohibits, by its terms, only conspiracies to deter persons from testifying in "any court of the United States." As defined in 28 U.S.C. § 451, "court of the United States" refers only to the Article III courts and certain federal courts created by Act of Congress. It does not include the various state courts. This is fatal to plaintiff's claim, for it is only in a Louisiana state trial court that plaintiff was tried,

and in which defendants allegedly conspired to deter witnesses from testifying truthfully.[22]

Thus the complaint does not state a cause of action under 42 U.S.C. § 1985. This conclusion disposes of the claim under § 1986 as well, for § 1986 is entirely derivative from § 1985. By its terms, the former statute has reference only to conspiracies cognizable under § 1985. Accordingly, the courts have recognized that if the conspiracy underlying a claim asserted under § 1986 fails to meet the requirements of § 1985, then the § 1986 claim also must fall. Dowsey v. Wilkins, 467 F.2d 1022, 1026 (5th Cir. 1972); Johnston v. National Broadcasting Co., Inc., *supra*, 356 F.Supp. at 909-10; Post v. Payton, 323 F.Supp. 799, 802 (E.D.N.Y.1971); Huey v. Barloga, 277 F.Supp. 864, 875 (N.D.Ill.1967).

The motions by defendants to dismiss for failure to state a claim upon which relief can be granted have been brought only with reference to §§ 1985 and 1986. We simply emphasize here that the Court's granting of these motions does not dismiss any of the defendants from the present suit. Plaintiff's complaint still properly alleges a cause of action against each of the defendants pursuant to 42 U.S.C. § 1983, which none of the defendants have challenged.

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22 Although 28 U.S.C. § 451 was originally passed in 1948, "court of the United States" had the same meaning when Congress used the term in enacting the predecessor of 42 U.S.C. § 1985(2). The particular provision relating to conspiracies to deter witnesses from testifying truthfully was a little-discussed portion of the civil rights bill. But it is clear that the concern of Congress was solely to protect the integrity of the newly-created remedy in federal court. *See* Cong. Globe, 42d Cong., 1st Sess., p. 486 (remarks of Rep. Cook). Thus, Congress did not intend that portion of the statute to extend to any interference with the testimony of witnesses which occurred only in connection with state court proceedings.

Although that statute carries with it the requirement that the prohibited acts be committed under color of state law, it is now clear that private persons may be sued under the statute if they are acting in conspiracy with some state official. United States v. Price, 383 U.S. 787, 794, 86 S.Ct., 1152, 16 L.Ed.2d 267 (1966); Fulton v. Emerson Electric Co., 426 F.2d 527, 530 (5th Cir. 1969); Gomez v. Florida State Employment Service, 417 F.2d 569, 578-79 (5th Cir. 1969); Baldwin v. Morgan, 287 F.2d 750 (5th Cir. 1961). The Supreme Court, construing 18 U.S.C. § 242, the criminal counterpart of 42 U.S.C. § 1983, stated:

> "Section 242 applies only where a person indicted has acted 'under color' of law. Private persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute. To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents." (footnote omitted) United States v. Price, *supra*, 383 U.S. at 794, 86 S.Ct. at 1156.

The same result is required under § 1983, since "under color" of law has an identical meaning under both statutes. *Id.* at 794, n. 7, 86 S.Ct. 1152.

In the case at bar, plaintiff's complaint more than adequately alleges a conspiracy between the private defendants and Jim Garrison, who was acting under state law in his capacity as District Attorney of Orleans Parish. The details of these allegations are set out in Part I of the Court's opinion, and need not be

repeated here. Plaintiff may or may not be able to prove such allegations at trial, but they are clearly sufficient to state a cause of action under § 1983 against each of the defendants.

For the reasons stated above,

It is the order of the Court that the motion on behalf of defendants, Joseph M. Rault, Jr., Cecil M. Shilstone, Willard E. Robertson, and Dr. Esmond A. Fatter, to dismiss for abatement of the action due to the death of plaintiff, Clay Shaw, be, and the same is hereby, denied.

It is the further order of the Court that the motion on behalf of defendants, Joseph M. Rault, Jr., Cecil M. Shilstone, Willard E. Robertson, and Dr. Esmond A. Fatter, to dismiss for failure to state a claim under 42 U.S.C. §§ 1985, 1986, upon which relief can be granted, be and the same is hereby, granted.

APPENDIX E

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

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42 U.S.C. § 1988. Proceedings in vindication of civil rights

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

Louisiana Civil Code, Art. 2315. Liability for acts causing damage; survival of action

Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.

The right to recover damages to property caused by an offense or quasi offense is a property right which, on the death of the obligee, is inherited by his legal, instituted, or irregular heirs, subject to the community rights of the surviving spouse.

The right to recover all other damages caused by an offense or quasi offense, if the injured person dies, shall survive for a period of one year from the death of the deceased in favor of: (1) the surviving spouse and child or children of the deceased, or either such spouse or such child or children; (2) the surviving father and mother of the deceased, or either of them, if he left no spouse or child surviving; and (3) the surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child, or parent surviving. The survivors in whose favor this right of action survives may also recover the damages which they sustained through the wrongful death of the deceased. A right to recover damages under the provisions of this paragraph is a property right which, on the death of the survivor in whose favor the right of action survived, is inherited by his legal, instituted, or irregular heirs, whether suit has been instituted thereon by the survivor or not.

As used in this article, the words "child", "brother", "sister", "father", and "mother" include a child, brother, sister, father, and mother, by adoption, respectively.

APPENDIX

Supreme Court, U. S.
FILED
JAN 19 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77 - 178

WILLARD E. ROBERTSON,

Petitioner

versus

EDWARD F. WEGMANN, EXECUTOR FOR CLAY L. SHAW, *ET AL.*,

Respondents

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petition for Certiorari Filed August 1, 1977
Certiorari Granted December 5, 1977

IN THE
SUPREME COURT OF THE UNITED STATES

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All items, except the docket entries (reprinted hereinafter), which Supreme Court Rule 36 requires for an appendix to a brief on the merits were previously printed as the Appendix to the Petition for Certiorari and appear on the following pages of that Appendix:

Appendix A - Opinion of the Court of Appeals..... 14

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Appendix C - Court of Appeals' Denial of Rehearing... 30

Appendix D - Opinion of the District Court 32

Appendix E - Text of Statutes Involved..... 71

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Appendix G - Docket Entries of the United States Court of Appeals for the Fifth Circuit . . 15

APPENDIX F

DOCKET ENTRIES OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

Proceedings

2/27/70	Flg. COMPLAINT. Issg. 4 summons
3-6-70	Flg. request for 2 summ. Issg. Same.
3/9/70	Flg. rtn on 1 summons. Served Cecil M. Shilstone - Jane S. Fleshman, 3/5/70.
3/9/70	Flg. rtn on 1 summons. Served Jos. M. Ralt, Jr. 3/5/70.
3/10/70	Flg. rtn on 1 summons. Served Jim Garrison thru Jim Alcox, 3/5/70
3/23/70	Flg. Mtn of deft., Willard E. Robertson and ORDER that he granted an extension of time up to and including 4/27/70, within which to plead, etc. (FJRH) 3/23/70 Ent. 3/24/70 Issg. Not.
3/20/70	Flg. Mtn of deft., Jos. M. Rault, Jr. and ORDER that he is granted an extension of time up to and including 4/27/70 within which to plead etc. (FJRH) 3/23/70 Ent. 3/24/70 Issg. Not.
3/23/70	Flg. Mtn of deft. Jim Garrison, and ORDER that he is granted an extension of time up to and including 4/27/70, within which to plead, etc. (FJRH) 3/23/70 Ent. 3/24/70 Issg. Not.

3/24/70 Flg. rtn. on 1 sumns, served Williard E. Robertson thru Barbara Krippar, 3/19/70.

4/13/70 Flg. rtn on 1 sums, served 4/8/70 Perry Raymond Russo, personally.

4/21/70 Flg. deft's., Jos. M. Rault, Jr., Mtn for extension of time to plead and ORDER same until 5/27/70. (FJRH)

4/21/70 Flg. Mtn of deft., Willard E. Robertson, for extension of time within which to plead and ORDER granting same until 5/27/70. (FJRH)

4/22/70 Mtn of Perry Raymond Russo and ORDER that he is granted an extension of time to plead up to and including 5/28/70. (FJRH)

4/23/70 Rtn on 1 sums. exec. 4/10/70, Dr. Esmond A. Fatter.

4/22/70 Mtn of deft, Jim Garrison and ORDER that he is granted an extension of time to 5/27/70 to plead. (FJRH) 4/23/70

4/30/70 Mtn for summary judgment by deft., Cecil M. Shilstone, Notice of Hrg on 5/20/70
Attachments anexed.

5/20/70 Hrg. on Mtn of deft., Cecil M. Shilstone for summary judgment - contd to be reassigned. (FJRH)

5/20/70 Mtn of Clay L. Shaw and ORDER that hrg on deft. Cecil M. Shilstone's mtn for summary judgment is contd until pltf shall have had an opportunity to take the depositions of defts and others. (FJRH)

5/22/70 Mtn of defts, Willard E. Robertson and Jos. M. Rault, Jr. to dismiss; Notice of Hrg. on 9/16/70

5/22/70 Mtn of deft Jim Garrison to dismiss; Notice of hrg on 9/16/70; Memo.

5/26/70 Mtn of Perry R. Russo for extension of time to plead ORDER DENIED. (FJRH) 6/1/70 ent 6/1/70

6/4/70 Mtn of deft. Perry Raymond Russo to dismiss; Notice of hrg on 9/16/70; Memo.

9/1/70 Deft Cecil M. Shilstone's Motion to Dismiss and notice of hrg on 9-16-70.

9/4/70 ANSWER by Dr. Esmond A. Fatter.

9/3/70 M & O that hearing on respective motions of defts. Jim Garrison, Willard E. Robertson, Joseph M. Rault, Jr., Cecil M. Shilstone and Perry Raymond Russo to dismiss action fixed for hearing on 9/16/70 are continued to November 4, 1970. FJRH 9/3/70 Ent. 9/4/70 Issg. notices.

9/30/70 Pltf's interrog to Joseph M. Rault, Jr.
9/30/70 Pltf's interrog to Cecil M. Shilstone.
9/30/70 Pltf's interrog to Willard E. Robertson.

10/6/70 Interrog. by pltf to Jim Garrison

10/12/70 Mtn of defts for order that no objections or answers need be made to interrog.; Notice of

Hrg. 11/4/70; ORDER that defts are relieved from object ng to and/or answering the interrog propounded to them by pltf, pending determination of the foregoing mtn. (FJRH) 10/12/70 ent 10/13/70 Memo annexed.

10/12/70 Deft Jim Garrison Mtn for order that no objections or answers need be made to interrog.; Notice of Hrg. 11/4/70; ORDER that deft Jim Garrison is relieved from objecting to and/or answering the interrog propounded to him by pltf., pending determination of the foregoing mtn. (FJRH) 10/12/70 ent 10/13/70 Memo annexed.

10/16/70 Mtn of defts and ORDER that the motions to dismiss filed on behalf of various defts. and which are set for hrg on 11/4/70 are contd to be refixed for hrg. at a later date on the motion of counsel of record for any of the parties to these proceedings. (FJRH) 10/15/70 ent 10/19/70

10/22/70 Motion of deft. and ORDER that the motion to dismiss heretofore filed by deft. Perry Raymond Russo and which is set for hearing on 11/4/70, be & the same is hereby cont'd to be refixed for hearing at a later date on the motion of counsel for any of the parties to these proceedings. 10/23/70 (FJRH) Ent. 11/26/70.

10/30/70 Pltf's Mtn to recall ex parte order of 10/12/70 and for order to permit discovery; Notice of Hrg. 11/4/70

11/4/70 Hrg. on Mtn of defts Willard E. Robertson and Jos. M. Rault, Jr. for Order that no objections or answers need be made to interrogatories and Mtn of deft. Jim Garrison for Order that no objections or answers need be made to interrog. DENIED with prejudice. (FJRH) ent 11/4/70 (Hrg. on Mtn of pltf to recall ex parte order of 10/12/70 and for order to permit discovery - GRANTED.)

12/7/70 Cert. copy of ORDER from Court of Appeals that petitioner's mtn for a writ of mandamus, filed is DENIED. That petitioners' mtn. for stay is DENIED.

12/21/70 Deft. Garrison's Answers to Interrog. w/large box of exhibits.
12/21/70 Deft. Rault's answers to interrog.
12/21/70 Deft. Robertson's Answers to interrog.

12/29/70 Defts' mtn to dismiss notice of hrg. 1/13/71.
12/29/70 Deft. Garrison notice of hrg 1/13/71, mtn to dismiss.

12/31/70 Pltf's Mtn. for order compelling answers to interrogs., notice of hrg. 1/13/71. Attachments annexed.

1/13/71 Hrg. on Mtn. of defts Robertson and Rault to dismiss, Mtn of deft Garrison to dismiss, Mtn of pltf for order compelling answers to Interrogs. - Contd to 1/27/71. (FJRH) ent 1/13/71.

1/15/71 Cecil M. Shilstone's Answers to interrogs.

1-8-71 Pltfs Mtn for continuance & ORDER (FJRH) that hrg on mtns to dismiss are continued from 1/27/71 to March 31, 71 at 10 a.m., Signed 1-15-71, ent. 1-25-71.

1/22/71 Deft.Perry Raymond Russo's notice of hrg. on 3/31/71 on Mtn to dismiss complt.

3-31-71 M.E. and order that the motion set for 3-31-71 is continued to 5-12-71. (FJRH) ENT 3-31-71.

5-10-71 Motion and order that the firm of Denechaud and Denechaud is authorized to withdraw as counsel for the deft Cecil M. Shilstone. Further ordered that the firm of Sehrt, Boyle, Wheeler and Butler is recognized as counsel for the deft Cecil M. Shilstone. (FJRH) ENT 5-12-71

5-12-71 Hrg on motion of defts Robertson and Rault to dismiss. Motion of deft Jim Garrison to dismiss. Motion of Pltf for order compelling answers to Interrog. Motion of deft C.M. Shilstone to dismiss. Motion of deft P. R. Russo to Dismiss. (1) (2) (3) (4) and (5) Motion ordered dismissed as being MOOT. (1) (2) (4) (5) CONTINUED AS AN Open matter until 6-30-71. Pltf has 30 days or until 6-12-71 to amend complaint. (FJRH) ENT 5-14-71

6-11-71 Pltf's motion and order that pltf is given leave to amend complaint. (FJRH) ENT 6-14-71

6-11-71 Pltf's supplemental and amended complaint.

6-18-71 Deft's motion and order that the hrg on the respective motions of defts Jim Garrison, Willard E. Robertson and J. M. Rault, Jr. to dismiss this action presently fixed for hrg on 6-30-71 is continued to 9-22-71 (FJRH) ENT 6-21-71

6-21-71 Deft Cecil Shilstone's motion and order that the hrg on the motion of deft Shilstone, to dismiss this action set for hrg on 6-30-71 is continued to 9-22-71 (FJRH) ENT 6-23-71

9-24-71 Defts Garrison, Robertson, Rault and Shilstone's motion to dismiss this action set for hrg on 9-29-71 is continued to 10-20-71. (FJRH) ENT 9-28-71

9-29-71 Motion of defts Robertson and Rault to dismiss; Motion of deft Jim Garrison to dismiss; Motion of Deft C. M. Shilstone to dismiss; Motion of deft Perry R. Russo to dismiss. Continued to 10-20-71. (FJRH) ENT 9-29-71.

10-5-71 M.E. and order that the hrg on the following motions, (1) motion of defts Robertson and Rault to dismiss; (2) Motion of deft J. Garrison to dismiss; (3) Motion of deft Shilstone to dismiss; and (4) Motion of deft P.R. Russo to dismiss; previously set for 10-20-71 is continued to 10-20-61 at 4:00 P.M. (FJRH) ENT 10-5-71.

10-20-71 Hrg on motion of defts Robertson and Rault to dismiss
Hrg on motion of deft Garrison to dismiss
Hrg on motion of deft Shilstone to dismiss

Hrg on motion of deft Russo to dismiss. (SUBMITTED) (FJRH) ENT 10-22-71

10-29-71 M.E. and ORDER that motion of defts J.M. Rault, W.E. Robertson, J. Garrison, C.M. Shilstone and P.R. Russo, to dismiss is Denied. (FJRH) ent 11-1-71.

11-5-71 Deft's motion for certification under interlocutory appeals act and order allowing this motion to be heard on 11-10-71. (FJRH) ENT 11-5-71.

11-10-71 Deft Russo's motion for certification under Interlocutory Appeals Act and notice of hrg on 11-10-71.

11-24-71 Joint stipulation that defts, Garrison, Robertson, Rault, Shilstone and Russo shall not seek from this court, nor from the Court of Appeals for the 5th Circuit, a stay of these proceedings, pending a decision by the Court of Appeals on their application for an appeal from the Court's judgment of 11-1-71 denying their mothons to dismiss.

12-1-71 ORDER of certification under interlocutory appeals Act. (FJRH) ENT 12-171

1-5-72 Mandate and order from the 5th Circuit Court of Appeals. Order that leave to appeal from the interlocutory order of the U.S. Dist. Court entered on 12-1-71 is DENIED. (BROWN) ENT 1-5-71.

4-24-72 ANSWER of Deft. Jim Garrison to complt.

4-24-72 ANSWER of Defts. Robertson and Rault to complt.

12-19-72 M.E. (FJRH) 12/18/72 a status conference was held this day; ORDERED that all discovery in theis matter ve completed by 4/27/73 and all motions filed by 4/26/73 and this matter placed on trial docket; pre-trial conference is set for 4/27/73 at 9:30 a.m. and trial is set for 6/18/73 at 10:00 a.m. with jury ent. 12/20/72.

12-22-72 M.E. (FJRH) 12/18/72 status conference was held this day in the above-entitled matter ORDERED that all discovery in this matter be completed no later than 4/27/73; and all motions be filed with the court by 4/26/72; and this matter be placed on trial docket; pre-trial conference is set for 4/27/73; trial is set for 6/18/73 at 10:00 a.m. with jury (FJRH) ent. 12/26/72.

1-4-73 M.E. Status conf. held on 12-18-72; ORDER that case be placed on trial docket; That pre trial conf is set for 4-27-73 at 9:30 am; Trial is set for 6-18-73 at 10am with jury. (FJRH) ent 1-5-73.

1-15-73 Defts. Jim Garrison, Joseph Rault, and Willard Robertson's interrogatories to Pltf.

3-2-73 Pltf.'s Answers to interrogs.

3-29-73 Defts. mtn to continued pre-trial and discovery deadline; hearing 4-25-73 10am.

3-29-73 Defts. objections to pltfs. answer to interrs. and mtn to compel proper answers; hearing 4-25-73 10am.

4-3-73 M.E. (MLS) ORDERED that the Motion to continue Pre-trial ocnference and Discovery scheduled for Hrg. 4-25-73 be reset to 4-19-73 at 9:00 a.m. ent. 4-4-73.

4-5-73 M.E. (MLS) ORDERED; All motions set for hrg. 4-25-73 are reset for 4-19-73 at 9:a.m.ent.4-5-73

4-11-73 Defts.'s motion to continue deadline for filing of motions and Hrg. 4-19-73 at 9:a.m.

4-16-73 ORDER of reference to U.S.Mag.Sear for hearing and disposition of discovery motions (FJRH) 4-16-73.

4-16-73 Pltf.'s certificate Re meeting pursuant to local rule 4D.

4-19-73 M.E. (MLS) ORDERED; Deft.'s Motion to continue pre-trial conf. and discovery and motion to continue deadline for filing, GRANTED, Deft.'s motion to compel answers to interrogs. GRANTED in part; DENIED in part.

5-3-73 Joint Motion and ORDERED that the trial of this case scheduled for 6-18-73 be continued to be fixed at a later date.(FJRH) 5-14-73 ent. 5-17-73.

5-31-74 M.E. (FJRH) ORDERED that the status conf. set in this matter be, cont'd to 6-17-74, @9:15 a.m.

6-5-74 M.E. (FJRH) ORDERED that status conf. set for 6-17-74, be cont'd. to 6-26-74 @ 9:30 a.m. Ent. 6-6-74.

6-10-74 Deft.'s motion and ORDERED, that John P. Volz, be allowed to withdraw as counsel for deft.; (FJRH), Ent. 6-11-74.

6-27-74 M.E. (FJRH) 6-26-74 status conf. held; pre-trial conf. 10-23-74, @ 9:a.m.; trial 11-4-74, @ 10:a.m. with a jury; Ent. 6-27-74.

6-26-74 MOTION AND ORDERED; (FJRH) that F. Irvin Dymond, be entered as co-counsel for pltf. Ent. 6-27-74.

7-8-74 Deft. Fatter's motion and ORDERED that Richard C. Balwin be enrolled as counsel of record; (FJRH), Ent. 7-10-74.

7-12-74 Deft. Dr. Fatter's motion fo summary judgment and notice of hrg. 9-25-74, @ 10:a.m.

7-17-74 Pltf.'s Amended and Supplemental answers to interrogatories of defts.

7-26-74 Deft's notice to take the deposition of Pltf. on 8-6-74.

7-26-74 Cecil Shilstone's motion and ORDERED that the name of Peter J. Butler and Clem T. Sehert be entered as co-counsel for Cecil Shilstone; (FJRH), 7-29-74, Ent. 7-30-74.

8-14-74 Defts J. Rault, Jr., and Willard E. Robertson's 2nd set of interrogs to pltf.

8-28-74 Defts. Rault & Robertson SUGGESTION OF PLAINTIFF'S DEATH.

9-3-74 Deft. Perry Raymond Russo's suggestion of pltfs. death.

9-9-74 Mtn of defts to dismiss for stinguishment of claim; hrg set 9-25-74 at 10 a.m.

9-10-74 Motion of deft Cecil M. Shilstone to dismiss; HRG set for 9-25-74 at 10am.

9-11-74 Deft. Fatter's mtn. to dismiss; hrg. 9/25/74.

9-11-74 Deft. Fatter's suggestion of pltfs. death.

9-18-74 Mtn of Deft Dr. Fatter to dismiss; hrg set 10-23-74 at 10 a.m.

9-25-74 Pltf.'s MTN. & ORDER hearing on Mtns. to dismiss CONTINUED to 10/23/74. FJRH 9/25/74. ent. 9/25/74.

9-10-74 Deft. C.M. Shilston MTN & ORDER To Extend Deadline for Filing Mtns. to 2/10/74. FJRH 9/25/74, ent. 9/25/74.

9-27-74 HRG: 9/25/74, MTN's of Deft.'s to Dismiss CONTINUED to 10/23/74. (FJRH) ent. 9/27/74.

9-30-74 Mtn of Edw. Wegmann for substitution of party's pltf; hearing 10-23-74 10am.

10-4-74 Mtn. of Edward Wegmann & ORDER SUBSTITUTING HIM as him as pltf. in lieu of Clay L. Shaw. FJRH/ ent. 10/7/74.

10-9-74 MTN. & ORDER: Trial set 11/4/74 CONTINUED TO 3/10/75.

10-18-74 Sub. Pltf.'s Opposition to Mtn. to Dismiss.

10-24-74 M.E. Hrg. Held 10/23/74 Arguments SUBMITTED. FJRH, ent. 10/24/74.

11-12-74 M.E. Disclosure by Ct. atty retained in personal matter member of firm "Garrison" ORDER: Copies of this Disclosure to be served on counsel by 11/12/74; If objection filed, case to be realloted; Filing of objection not be be made knows to FJRH. sgd. FJRH 11/12/74, ent. 11/12/74.

12-3-74 M.E. Parties are directed to file written brief by 12/20/74; Additional oral argument is not considered necessary for the Ct. to reach its decision. Ct. will defer decision on all of the defendants' mtns. pending receipt of their briefs. FJRH, ent. 12/3/74.

3-4-75 OPINION: & ORDERED that the mtn on behalf of defts Rault, Shilstone, Robertson, & Dr. Esmond A. Fatter to dismiss for abatement of the action due to the death of pltf, Clay Shaw is DENIED; & that the mtn on behalf of defts

Rault, Shilstone, Robertson & Fatter to dismiss for failure to state a claim under 42 USC 1985, 1986, upon which relief can be granted is GRANTED (FJRH) ent 3/4/75.

3-10-75 Joint Mtn & ORDERED that all proceedings in this Court be stayed pending final disposition of any interlocutory appeal from said order of March 4, 1975 (FJRH) ent 3/13/75.

3-18-75 Defts. mtn & ORDERED that the copies of the Affidavit of Heirship & the last Will & Testament of Clay L. Shaw, fully described as Appendix C & Appendix D are transmitted to the Clerk of this Court to be filed in the record. (FJRH) ent 3/19/75

3-19-75 Filing Affidavit

4-9-75 (5th Circuit Court of Appeals) ORDERED that leave to appeal from the Interlocutory order of the U.S. Dist. Court for the Eastern Dist. of La. entered on 3/13/75 is Granted.

4-16-75 Bond for Costs on Appeal in the amt of $250.

APPENDIX G

DOCKET ENTRIES OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

4/18/75 Record on Appeal

4/18/75 Exhibits

5/16/75 Appendix

5/23/75 Brief - Appellants

6/10/75 Brief - Appellee

6/17/75 Extension for Reply Brief to 6/24/75

6/24/75 Reply Brief for Appellants

3/31/76 Case assigned for 5/11/76

5/11/76 Case argued

1/24/77 Opinion rendered

1/27/77 Mot. for Ext. - Rehearing - Ext. to 2/21/77 (Appellants)

2/17/77 Mot. for Ext. - Rehearing - Ext. to 3/7/77 (Appellants - Rault, et al)

2/18/77 Flg. granting of extension to incl. 3/7/77 for filing pet. for rehearing by appellant, Shilstone.

3/7/77	Flg. motion of appellant, Willard E. Robertson, to file pet. for rehearing en banc in excess of 15 pages, not to exceed 18 pages. (GRANTED - BEW)
3/7/77	Petition for rehearing - En Banc
6/20/77	Order denying rehearing (En Banc)
6/24/77	Stay of mandate
8/8/77	Notice of Flg. of Cert. Pet. on 8/1/77
12/12/77	Order of S.C. Granted 12/5/77
12/19/77	Preparing Proceedings on Certiorari (orig. record)

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77 - 178

WILLARD E. ROBERTSON,
Petitioner

versus

CLAY L. SHAW
(EDWARD F. WEGMANN, EXECUTOR),
Respondent

RESPONSE TO PETITION FOR CERTIORARI
TO THE COURT OF APPEALS FOR THE
FIFTH CIRCUIT

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SUPREME COURT OF THE UNITED STATES
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WILLARD E. ROBERTSON,
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CLAY L. SHAW
(EDWARD F. WEGMANN, EXECUTOR),
Respondent

RESPONSE TO PETITION FOR CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

As directed by the Court, respondent, Edward F. Wegmann, files this response to the petition of Willard E. Robertson praying that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit in No. 75-2091, rendered on January 24, 1977 (rehearing denied, June 20, 1977), affirming the judgment of the District Court denying defendants' motion to dismiss this action for damages under 42 USC 1983 for the reason that it had abated with plaintiff's death.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 545 F 2d 980, and is reproduced as Appendix A, p. 14; the order of the Fifth Circuit denying the application for rehearing is reproduced as Appendix C, p. 30. The decision of the United States District Court for the Eastern District of

Louisiana is reported at 391 F. Supp. 1353, and appears as Appendix D, p. 32.

JURISDICTION

Petitioner has filed his application for certiorari pursuant to 28 USC 1254(1).

QUESTIONS PRESENTED

Respondent does not agree with petitioner's presentation of the questions presented and submits that the questions presented are:

1. There being no Federal Statutory Law of survival of Civil Rights actions, does this lack of survival make the Federal law "deficient in the provisions necessary to furnish suitable remedies" for Civil Rights violations?

2. Whether this pending action for damages sustained by plaintiff, Clay Shaw, prior to his death, survives in favor of the substituted plaintiff, the personal representative of his succession, Edward F. Wegmann, the duly qualified Testamentary Executor of the Succession of Clay Shaw, the original plaintiff, as a matter of Federal common law.

STATUTES INVOLVED

The statutes involved are as stated at page 3 of petitioner's application.

STATEMENT OF THE CASE

The Trial Court correctly and accurately stated the case,

the course of the proceeding conducted in the lower court, and the facts relevant to the issues presented for review (Appendix D, p. 32). For additional facts pertaining to the case, see *Shaw v. Garrison*, 328 F. Supp. 390 (E.D. Ala. 1971, Affirmed 467 F.2d 113, 5th Cir. 1972), most especially the Trial Court's findings of fact and conclusions of law as set forth in said opinion.

It is interesting to note that Garrison and the other defendants, including the petitioner, have taken great umbrage at the fact that the Trial Court saw fit in writing its opinion to outline in some detail the present posture of this litigation, which, as it was termed by the Trial Court, and by many other writers, "one of the most bizarre episodes in American political and legal history". The background of this litigation is essential to a complete understanding of the case, and any statement of the case which does not include a detailed account of the background of the litigation, would be incomplete if, as was held by the Trial Court, ". . .Shaw surely deserves an opportunity to have his day in Court and attempt to clear his name, if only post-humously". The Court must have full knowledge of the background of the litigation.

Petitioner and his co-defendants have been highly critical of the Trial Court's opinion resulting in the issuance of an order denying their motion to dismiss. A reading of the Trial Court's opinion will reflect that it is a well-reasoned opinion which accurately states the facts of the case and after a detailed and analytical review of the statutes and jurisprudence, rightfully concludes that there is no impediment to the creation of a Federal common law of survival in Civil Rights actions in favor of the personal representative

of the deceased.

The Appellate Court agreed with the Trial Court and borrowed liberally from Judge Heebe's reasoning in his opinion.

The Appellate Court termed the facts of the case Kafkaesque, and very briefly stated the late Clay Shaw, through his Executor, respondent herein, charges that former District Attorney, Garrison, and other defendants, including petitioner, Robertson, and other citizens of New Orleans, deprived Shaw of his Civil Rights by improperly and illegally linking him with the Kennedy assassination and by conducting, as well as financing, a well publicized investigation and prosecution of him for his alleged role in the Kennedy assassination. The question presented to the court arises because Shaw died after the damage suit was initiated on his behalf, but before the matter was brought to trial.

REASONS FOR DENYING THE WRIT

The Trial Court, as well as the Appellate Court, was correct when it refused to follow the law of the forum state, since to do so, would have resulted in the dismissal of Shaw's Section 1983 claim.

The Trial Court, as well as the Appellate Court relied upon the clause in Section 1988 providing for those situations where there is no federal survival statute which would afford the substituted plaintiff, respondent herein, a suitable remedy. The Trial Court, as well as the Appellate Court, emphasized this clause, saying:

> ". . .so far as the same is not inconsistent with the Constitution and laws of the United States shall be extended to and govern the said Courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty".

The Trial Court cited numerous authorities to the effect that the failure of Congress to provide for survial in the Federal Rights Laws is a deficiency in those provisions. The Trial Court's opinion stated that there was a "gap" and a deficiency in the Federal law. That such is the case is amply supported by the Appellate Court's decision in *Brazier v. Cherry*, 293 F.2d, 401, CCA 5, 1961. The Trial Court stated:

> "Every court that has considered the matter has found either explicitly or by implication that the lack of survival provisions in the Federal Civil Rights Law is such a deficiency."

Having concluded that there was a deficiency and a gap in the Federal Survival Statute, the lower courts gave consideration as to whether or not the Louisiana law furnishes a suitable remedy to the plaintiff and the substituted plaintiff, and concluded after analyzing the applicable provisions of the Louisiana Code of Civil Procedure, as well as those of the Louisiana Civil Code, that under those laws, pending actions, such as this one, do not survive in favor of the deceased plaintiff's personal representative. The Trial Court likewise concluded that under Section 1988, the Federal Court must not apply State law if it is "inconsistent with the Constitution and laws of the United States."

It is well established that the policy of the Civil Rights Laws favors survival of the action. The Louisiana statutes limit the classes of persons in favor of whom an action survives; hence, as was stated by the Trial Court "this policy of limiting the classes of persons in favor of whom an action survives (is) equally inconsistent with the Federal Civil Rights Laws."

In *Brazier*, the Fifth Circuit stressed the fact that the policy of the Civil Rights Acts is to afford relief, stating:

> ". . .from a Federal standpoint, the only limitation upon the use of such adoptive State legislation, rule or decision is that it is suitable to carry the law into effect because other available direct Federal legislation is not adapted to that object, or is deficient in furnishing a fully effective regress. . . ."

Nowhere in Section 1988 is it stated that the Federal Courts are bound by an inhospitable State law. Quite to the contrary, Section 1988 makes it implicit that the law of the State in which the Federal Court has jurisdiction must not be inconsistent with the Constitution and laws of the United States. Nor does the Section express restrictiveness or exclusiveness. As was stated by the Trial Court:

> "Here we have found Section 1988 to be inapplicable because a State law is not suitable to carry the (Federal) law into effect."

Following this provision of Section 1988 to its rightful conclusion, the State law is inconsistent with the laws of

the United States because the Louisiana law does not provide for the survival necessitated by the policies which generated the Civil Rights Statutes. Hence, the Louisiana Statutes and Codal provisions need not, and should not, be applied.

The need to provide for survival of Federal Civil Rights actions is particularly acute in cases such as this one where the deceased plaintiff's Federal Constitutional rights were misused and abused by the prosecuting attorney, Garrison, and his co-conspirators, including petitioner herein, in bad faith, with no hope of successful prosecution of the criminal charges which the prosecuting attorney caused to be filed against Shaw. The extent to which the prosecuting attorney, acting in concert with his co-conspirators, including petitioner herein, abused and misused the powers of his office of District Attorney in direct violation of the Federally guaranteed rights of Shaw is shown with clarity in the Conclusions of Fact of Judge Christenberry in the case of *Shaw v. Garrison*, supra.

The Appellate Court as well as the Trial Court were eminently correct in their holding that a Federal Court should not apply State law if it is "inconsistent with the Constitution and laws of the United States", and held that Louisiana law "is inconsistent with Federal law and should not be applied".

I. THE LOUISIANA SURVIVAL STATUTE.

Respondent does not deny that if Article 2315 of the Louisiana Civil Code is applicable, the motion to dismiss should be granted. It is submitted, however, that the Trial

Court's holding, as well as that of the Appellate Court, is in conformity with the provisions of Section 1988.

II. THE LAW OF LOUISIANA IS INCONSISTENT WITH THE LAWS OF THE UNITED STATES

The Louisiana Survival Statute is inconsistent with the Constitution and laws of the United States and were it to be applied, Shaw's cause of action would abate, hence there can be no doubt but that it is inconsistent with the Federal law and should not be applied.

The fact that other Federal laws not pertinent to the issues of this case, or pertinent to any Civil Rights action, may provide for survival of actions is of no importance. The fact remains that Section 1988 does not contain any provision with respect to survival of the action, as a result of which, there is a "gap" in the statute, and as a further result of which, it is deficient. Therefore, following the policies established and generated by the Civil Rights Acts, this action should survive in favor of the personal representative of the deceased plaintiff.

To apply Article 2315 of the Louisiana Civil Code to this case would be unjust, inequitable, and a violation of the deceased plaintiff's Fourteenth Amendment right, since States' survival statutes vary from State to State, as the result of which there is a complete lack of uniformity.

"The Civil Rights Acts were brought into being at a critical time in the history of the United States following the Civil War. They were intended to confer equality and civil rights before the law in all respects for all persons em-

braced within their provisions. We believe that the benefits of the Acts were intended to be uniform throughout the United States; that the protection to the individual to be afforded by them was not intended by Congress to differ from State to State, and that the amount of damages to be recovered by the injured individual was not to vary because of the law of the State in which the Federal Court suit was brought. Federal common law must be applied to affect uniformity; otherwise, the Civil Rights Act would fail to effect the purpose and ends which Congress intended." *Batista v. Weir*, 240 F.2d 74, 1965; *Gilmore v. City of Montgomery*, 94 S.Ct. 2416, 1974.

The rights of survivorship as established by Article 2315 of the Louisiana Civil Code are inhospitable to the present matter. They produce an invidious discrimination by narrow protection and thus violate the equal protection clause of the Fourteenth Amendment. See *State v. Devall*, 302 So. 2d 909, 1974; *Primeaux v. Libersat*, 307 So. 2d 740, 1975; *Dunn v. Blumstein*, 405 US 330, 92 S. Ct. 995, 31 L.Ed 2d 274, 1972; *Reed v. Reed*, 404 US 71, 92 S. Ct.. 251, 30 L.Ed. 2d 225, 1972; *Weber v. Aetna Casualty and Surety Co.*, 406 US 164, 92 S.Ct. 1400, 31 L.Ed. 2d 768, 1972; *Dandridge v. Williams*, 397 US 471, 90 S. Ct. 1153, 25 L. Ed. 2d 491; *Jimenez v. Weinberger*, 94 S.Ct. 2496, 1974; *Village of Belle Terre v. Borass*, 94 S.Ct. 1536, 1974; *Gulf Utilities Co. v. Traigle*, 319 So.2d 78, 1975; *Stanton v. Stanton*, 95 S.Ct. 1373, 1975.

"The existence of a statutory right implies the existence of all necessary and appropriate remedies." *Sullivan v. Little Hunting Park, Inc.*, 396 US 229, 90 S.Ct. 400, 24 L.Ed. 2d 386, 1969. Congress did not create enforceable Civil Rights

such as those provided for under the statutes applicable to this case, so as to allow the State to destroy those rights, or preclude them, as would be the case here, if Louisiana law is applied. If Article 2315 of the Louisiana Civil Code is applied, it would have the effect of destroying the Civil Rights provided for by Congressional mandate.

III. THE TRIAL COURT AS WELL AS THE APPELLATE COURT PROPERLY APPLIED FEDERAL COMMON LAW

Faced with the dilemma of an inhospitable State law and a deficient Federal law, the Trial Court solved the dilemma by holding that the old common law of abatement was no longer controlling. It likewise found that the trend of this Court was in favor of survival of Civil Rights actions. See *Van Breck v. Sabine Towing Co.*, 300 US 342, 57 S.Ct. 452, 81 L. Ed. 685, 1937; *Just, et al v. Chambers, Executrix*, 312 US 383, 61 S.Ct. 687, 85 L. Ed. 903, 1941; *Cox, et al. Administrators, et al v. Roth, Administrator*, 348 US 207, 75 S.Ct. 242, 99 L. Ed. 260, 1955.

As was said by the Trial Court:

> "We thus find no impediment to the creation of a Federal common law of survival in Civil Rights actions in favor of the personal representative of the deceased. To the contrary, such a holding seems required by the policies underlying the Civil Rights laws and the Supreme Court's treatment of survival of actions in analageous contexts."

As was said by the Fifth Circuit in *Brazier v. Cherry*,

supra, at 406:

> "At every turn the Supreme Court by drawing on available State legislation or giving broad liberal effect to Federal statutes has found a way to make compensation effective despite statutory language which might have made non-survival plausible if not probable during an earlier era."

As was said by this Court in *Sullivan v. Little Hunting Park*, supra, in holding that the plaintiff was entitled to compensatory damages under Section 1982 ". . .the existence of a statutory right implies the existence of all necessary and appropriate remedies."

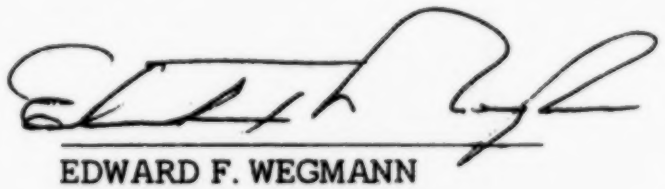
The lower courts have correctly held that there is no impediment to the creation of a Federal common law of survival in Civil Rights Actions in favor of the personal representative of the deceased. The holding was mandated by the policies underlying the Civil Rights laws and this Court's treatment of survival of actions in analagous contexts.

The Trial Court's decision and the affirmation thereof by the Appellate Court allows Clay Shaw to have his day in court and seek to vindicate his character, his name and reputation which the prosecuting attorney, Garrison, and his co-conspirators, including petitioner herein, sought to destroy as a result of their actions against him by prosecuting him for a crime committed in another jurisdiction outside of the scope of authority of the prosecuting attorney for Orleans Parish, Louisiana, and a crime with which Shaw was in no way connected or implicated. The mere fact that the law of Louisiana may differ with that of the Federal com-

common law should not be allowed to abrogate the achievement of justice.

CONCLUSION

For the reasons set forth above, it is submitted that the petition for certiorari should be denied.



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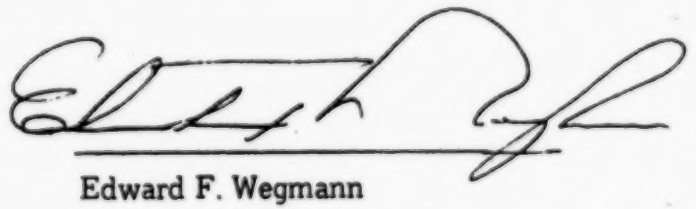
CERTIFICATE OF SERVICE

New Orleans, Louisiana
November 11, 1977

I hereby certify that I have this day served three (3) copies of the foregoing response to the application of Willard E. Robertson to the Supreme Court of the United States for certiorari to the Court of Appeals for the Fifth Circuit, by placing same in the United States Mail, postage prepaid, addressed to Malcolm W. Monroe, 47th Floor, One Shell Square, New Orleans, Louisiana 70139; Lawrence D. Wiedemann, 841 Carondelet Street, New Orleans, Louisiana; Joseph M. Rault, Jr., 234 Loyola Avenue, New Orleans Louisiana 70112; Richard C. Baldwin, One Shell Square, New Orleans, Louisiana 70139; Peter J. Butler, American Bank Building, New Orleans, Louisiana 70130 and Jim Garrison, 710 Carondelet Street, New Orleans, Louisiana 70130, and/or all interested individuals at their post office address.



Edward F. Wegmann

Supreme Court, U. S.
FILED
JAN 19 1978
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In the Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77 - 178

WILLARD E. ROBERTSON,

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versus

EDWARD F. WEGMANN, EXECUTOR FOR CLAY L. SHAW, *ET AL.*,

Respondents

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77 - 178

WILLARD E. ROBERTSON,

Petitioner

versus

EDWARD F. WEGMANN, EXECUTOR FOR CLAY L. SHAW, *ET AL.*,

Respondents

On Writ of Certiorari to the Court of Appeals For The Fifth Circuit

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 545 F2d 980, and is reproduced as Appendix A to the Petition for Certiorari (p. 14). The decision of the United States District Court for the Eastern District of Louisiana, reported at 391 F.Supp. 1353, appears as Appendix D to the Petition (p. 32).[1]

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1. All items which Sup. Ct. Rule 36 requires for the appendix to this brief on the merits were previously printed as the Appendix to the Petition for Certiorari, which will hereinafter be cited simply as "App.", with the appropriate section and page (*e.g.*, App. E, p. 71). A separate appendix referring to the Appendix to the Petition for Certiorari, and reproducing all docket entries below, has been printed and filed herewith.

JURISDICTION

The opinion and judgment of the Court of Appeals was entered on January 24, 1977, and the order denying the request for rehearing was entered on June 20, 1977. The petition for certiorari was filed on August 1, 1977, and granted December 5, 1977. The jurisdiction of this Court rests on 28 USC 1254(1).

STATUTES INVOLVED

42 USC 1983, and Louisiana's survivorship statute, Civil Code Article 2315, are reproduced as App. E (pp. 71-72). The issue before the Court turns on 42 USC 1988 which provides:

"The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause,

and, if it is of a criminal nature, in the infliction of punishment on the party found guilty."

QUESTIONS PRESENTED

1 - May a federal court, in determining whether an action under §1983 of the Civil Rights Act survives the death of the plaintiff, refuse to follow the dictates of §1988 of that Act which provides that -- inasmuch as the Civil Rights Act does not make any provision with respect to survival of actions under § 1983 -- the court shall look to, and be governed by, the law of the State in which the case is pending, and instead, judicially create a new "federal common law" of absolute survivorship, merely because the explicit law of the State provides for survival of such actions for personal damages only in favor of certain designated beneficiaries, none of whom was left by the deceased plaintiff?

2 - Can the decision of the court below be allowed to stand when there has never been in existence any federal common law of survivorship of civil actions -- to the contrary, the long-standing rule of common law being that an action abated with the death of the injured party -- and there is no real authority for the federal court now to create a federal common law of survivorship of an action under §1983 of the Civil Rights Act when Congress itself did not see fit legislatively to ameliorate the existing rule, except by enacting § 1988 of the Civil Rights Act to incorporate as federal law the state law of survivorship currently existing in the forum?

STATEMENT OF THE CASE

Clay L. Shaw brought this action against Jim Garrison

and others, including petitioner,[2] asserting a claim for damages under §1983 of the Civil Rights Act (42 USC 1983) by reason of his having been prosecuted for conspiracy to assassinate President Kennedy and, subsequently, for perjury charges growing out of the original prosecution. The court's jurisdiction was invoked pursuant to 28 USC 1331 and 1343.

While the action below was pending, plaintiff Shaw died. He was survived by neither spouse, parent, child, brother or sister, nor any other dependent kin. The only person now having an interest in the damages claimed in this action is plaintiff's sole residuary legatee, a friend. However, the district court, over the objection of defendants, entered an *ex parte* order, permitting the executor of Shaw's estate to be substituted as the plaintiff in this action.

Defendants moved to dismiss the action on the ground that it had been extinguished by Shaw's death, because under the law of Louisiana (Louisiana Civil Code, Article 2315), which must be extended to and govern this case under the dictates of §1988 of the Civil Rights Act, there is no party in whose favor the right of recovery legally survives.

The district court denied the motions, but certified its order, and on defendants' interlocutory appeal, the Fifth Circuit affirmed. The appellate court recognized that all

2. The defendants-appellants below were Jim Garrison, the District Attorney for the Parish of Orleans at the time the action was filed; an asserted member of Garrison's staff; and three private citizens, including petitioner Williard E. Robertson. Only Robertson petitioned for certiorari, but all other parties below have an "interest in the outcome" and have been designated as respondents in addition to Shaw's executor (U.S. Sup.Ct. Rule 21, par. 4).

parties are in agreement, and accepted the holding of the lower court, that under the law of Louisiana, plaintiff's claim under §1983 would have abated, since an action for damages for personal injuries, such as the instant one, survives the death of the plaintiff only in favor of certain designated beneficiaries customarily recognized as dependent relatives -- those having a close family tie to a deceased plaintiff -- that is, his spouse, children, parents or siblings. *Shaw vs Garrison*, 545 F2d 980, 982 (CA 5-1977); App. A, p. 16.

While conceding that it must look to the law of Louisiana under §1988 of the Civil Rights Act, the Fifth Circuit held, however, that inasmuch as the law of Louisiana does not provide for survival of this particular action, since plaintiff Shaw did not leave any of the designated familial beneficiaries, it was "inconsistent", not with the "laws of the United States", but with the "policy" or "purposes" of the Civil Rights Act and would be rejected. 545 F2d at 983; App. A, pp. 19-20. The Fifth Circuit, like the district court, then formulated a new "federal common law" of absolute survivorship of civil rights actions under §1983 when none had existed before. 545 F2d at p. 984 *et seq.*; App. A, p. 22 *et seq.*

SUMMARY OF ARGUMENT

1 - Since it is recognized beyond question that the Civil Rights Act is silent as to survival of actions under §1983, and the Louisiana law of survivorship cannot be said, logically or legally, to be inconsistent with that law or any other "laws of the United States", the federal courts must follow the dictates of §1988 of that act which directs that

the state law "shall be extended to and govern" the case. That the law of Louisiana is not inconsistent with "the laws of the United States" is fully demonstrated by reference not only to the Civil Rights Acts themselves and their legislative history, but to all other federal statutes providing for survival of actions.

2 - There is no real precedent or basis whatever for the federal courts to fabricate a "federal common law" of absolute survival of actions under §1983, rather than adopting as federal law (or "federal common law", if one will) the law of the state of the forum as commanded by §1988, especially when Congress has consistently refused otherwise to ameliorate the long-existing common law rule as to abatement of actions and to bring into the Civil Rights Acts any federal rule of survival of civil rights actions except the limited right of survivorship provided in §1986 for actions under §1985.

ARGUMENT

I - THE LOUISIANA LAW OF SURVIVORSHIP IS NOT INCONSISTENT WITH LAWS OF THE UNITED STATES AND SHOULD HAVE BEEN APPLIED TO THIS ACTION PURSUANT TO §1988.

Section 1988 of the Civil Rights Act clearly spells out the course of action which must be followed in situations such as the instant case. Congress, in its wisdom in formulating the applicable legislative policy for civil rights, commanded that:

> "The jurisdiction in civil . . . matters conferred on the district courts by the provisions of this

> chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies, . . . the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil . . . cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause . . ."

The appellate court recognized that, as was held by this Court in *Moor vs County of Alameda*, 411 US 693, 702 (1973), by the Fifth Circuit in *Brazier vs Cherry*, 293 F2d 401 (CA 5-1961), and by other circuits [*e.g., Pritchard vs Smith*, 289 F2d 153, 155 (CA 8-1961); *Hall vs Wooten*, 506 F2d 564 (CA 6-1974)], the Civil Rights Act is entirely silent as to survival of actions under § 1983 - that there is a "gap" in the law, that it is "deficient", in that respect (545 F2d 983).

It agreed with defendants that, in such a situation, "§1988 instructs federal courts as to what law to apply in causes of actions arising under federal civil rights acts. *Moor vs County of Alameda*, 1973, 411 US 693, 703" (545 F2d 982); that under that section, the Court is "directed to look to state law to fill the interstices in the federal

provisions" (*id.*); and that the Court "must apply Louisiana's survivorship law unless that law 'is inconsistent with the Constitution and laws of the United States' " (545 F2d 983).

The dispositive provision of Louisiana law is found in Civil Code Article 2315, as amended in 1960, which states in part:

> "The right to recover all other damages [*i.e.*, excluding 'damages to property'] caused by an offense or quasi offense, if the injured person dies, shall survive for a period of one year from the death of the deceased in favor of: (1) the surviving spouse and child or children of the deceased, or either such spouse or such child or children; (2) the surviving father and mother of the deceased, or either of them, if he left no spouse or child surviving; and (3) the surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child or parent surviving."

It is clear that the law of Louisiana does provide for survival of actions for personal injury of whatever nature.[3] It is also settled law that under Article 2315, pending actions for personal damages, as opposed to property damages, only survive in favor of the named classes of beneficiaries. *J. Wilton Jones Co. vs Liberty Mutual Insurance Co.*, 248 So. 2d 878 (La.App. 4th - Dec. 16, 1970), writ. den. 259 La. 61, 249 So.2d 202 (1971); *Austrum vs City of Baton Rouge*, 282 So.2d 434, 439 (La.-1973).

3. Thus, Louisiana is much more liberal in its view of survivorship than many states which deny survivorship entirely in actions for malicious prosecution, libel, slander, etc. See Addendum 2 hereto.

The Fifth Circuit recognized in its opinion below that all parties were in agreement, and accepted the holding of the district court, that under Civil Code Article 2315 plaintiff's claim under §1983 has abated (545 F2d 982).

The Fifth Circuit improperly concluded, however, that "because Louisiana's survivorship provisions would cause Shaw's pending civil rights action to abate, we find that Louisiana law is inconsistent with the broad remedial purposes embodied in the Civil Rights Acts", and decided that it would "decline to apply Louisiana law of survival" (545 F2d 983).[4]

The decision of the Fifth Circuit - like that of the district court - is a classic example of circular reasoning assiduously shunned by logicians and philosophers. Having found that the federal law is silent as to survival of civil rights actions, and that the Court must therefore go to the state law, as directed by §1988, the Fifth Circuit found that the state law - since it would not allow the action to survive in favor of merely the friend of the deceased plaintiff - is incon-

4. By way of seeking support of its action in rejecting the assertedly "inhospitable law" of the state, the Fifth Circuit cited *Pierson vs Ray*, 386 US 547 (1967) and *Jobson vs Henne*, 355 F2d 129 (CA 2-1966), but those cases involved determination of the applicability of certain special defenses to civil rights actions, and not the application under §1988 of substantive rights of survivorship as provided by state statutes. The Fifth Circuit also relied on *Franklin vs City of Marks*, 439 F2d 665 (CA 5-1971) as an instance where it "refused to apply a ten-day statute of limitations" because it would frustrate the aim of the Civil Rights Act, but the holding in that case was simply that the ten-day period "was not a true statute of limitations in the proper sense", but was instead "simply a procedural limitation on the parties' use of appellate process" (p. 668). The court went on to conclude that "the court must revert to the state, catch-all statute of limitations", and in fact did so. None of those decisions is apposite here. See also *post*, pp. 18-20.

sistent with the very federal law which it had held contains no provision as to survival of actions.

As the Eighth Circuit stated in *Pritchard vs Smith*, 289 F2d 153, 157 (CA 8-1961), "no inconsistency results from the application of state survival law", for the simple reason that "no federal statute specifically deals with the substantive issue of survival".

This Court in *Moor vs County of Alameda*, 411 US 693, 702 and fn. 14 (1973), held that "inevitably existing federal law will not cover every issue that may arise in the context of a federal civil rights action. One such problem has been the survival of civil rights actions under §1983 upon the death of either the plaintiff or defendant".

Moreover, § 1988 does not speak of inconsistency with unexpressed "purposes" or "policies" which may have influenced the enactment of federal laws, but inconsistency with the "laws" themselves, *i.e.*, statutes of the United States (as distinguished from the more generic, philosophic federal "law", which also includes decisional, common and natural law). *Cf. National City Bank vs National Sec. Co.*, 58 F2d 7, 9 (CA 6-1932); *Fitzpatrick vs Simonson Bros. Mfg. Co.*, 86 Minn. 140, 90 N.W. 378, 381 (1902); *Gilliam vs California Employment Stabilization Commission*, 130 CA2d 102, 278 P2d 528, 536 (1955).

Nor has either of the courts below been able to cite any other federal laws with which the Louisiana law of survival can be said to be inconsistent. To the contrary, all of the federal laws which provide for survival of actions restrict that right to certain designated beneficiaries just as does the

Louisiana Civil Code.[5]

It is fundamental logic that nothing can be inconsistent with something that does not exist.

Nor can the decision of the court below be properly predicated on the proposition that in enacting the Civil Rights Acts, Congress intended for actions under §1983 to survive without any limitation or restriction whatever.

To the contrary, in the course of the legislative process leading to the adoption of the Civil Rights Act of 1871, Congress expressly rejected a proposed amendment which would have provided for a broad survival of actions.[6] Instead, in § 1986 of the Civil Rights Act, Congress provided that when death results from an act of "invidious discrimination" prohibited by Section 2 (§1985) of the Act [*Griffin vs Breckenridge*, 403 US 88 (1971)], the cause of action under that section survives only "for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased".

Thus, under the appellate court's view of the "policy" or "purposes" of the Civil Rights Acts as adopted by Congress,

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5. The Federal Employers' Liability Act, 45 USC 51, *et seq.*; the Jones Act, 46 USC 688; the Longshoremen's and Harbor Workers' Compensation Act, 33 USC 908-909; and the Death on the High Seas Act, 46 USC 761, *et seq.*

6. See Cong. Globe, 42d Cong. 1st Sess., 704 (1871). The House refused to concur with the Senate's proposal (*id.* at 725). In conference, the Senate agreed to drop the amendment, and the present §1986 was adopted (*id.* at 804). See also, "Federal Civil Rights Act Incorporates State Wrongful Death and Survival Laws", 14 Stanford L. Rev. 386, 392 fn. 34 (1962).

there would be the incongruity of an extremely limited survivorship under the "Ku Klux Act" when the plaintiff dies as a result of the proscribed "invidious discrimination" under §1985, but an absolute, all encompassing survivorship of an action were death to follow what one might term the "garden variety" type of civil rights violation proscribed by §1983 of that Act.

§1988 was originally adopted by Congress in 1866 as part of an earlier Civil Rights Act (Act Apr. 9, 1866, C.31, §3, 14 Stat. 27), together with the predecessor (in much different context) of what ultimately became §1983. Careful study of the legislative debates of the 1866 Act shows that the major concern at that time (prior to adoption of the 14th Amendment) was that the constitutional power to protect individual rights then rested only in the states, not the federal government.[7] Repeatedly, in considering various parts of the bill other than the second part of Section 3 (§1988), there were objections raised as to infringement of states' rights. The referral to and adoption of state law under the second part of Section 3 was never the subject of any debate whatever,[8] since obviously it was deemed to constitute a recognition of the law of the forum state as controlling. What a furor would have resulted if any mem-

7. See, *e.g.*, Congressional Globe, 39th Cong. 1st Session, pp. 497, 499, 504, 522-530, 569-578, 594-607, 1265, 1290-1296.

8. *Cf.* Senator Davis' attack on the provision of Section 3 permitting removal of an action from state to federal court on the ground it deprived the states of their right to try their own cases (Congressional Globe, 39th Congress, 1st Session, pp. 598-599). While the Senate ultimately approved certain House amendments to the first part of Section 3 with reference to the Freedman's Bureau, the second part of that section (now §1988) was adopted as originally drafted without any question.

ber of Congress had even suggested that a federal court could refuse to apply the pertinent state law under Section 3, and instead formulate a federal common law of survivorship of actions under the Civil Rights Act!

After adoption of the 14th Amendment, the Civil Rights Act of 1866 was re-adopted by Congress in 1870 (the Enforcement Act, May 31, 1870, c. 114, 16 Stat. 144). Again Congress made no effort to provide for survivorship of actions nor did it otherwise evidence any intent to militate against the applicability of state law under §1988.

In 1871, Congress passed the Ku Klux Act after considerable debate, and Sections 1983, 1985 and 1986 came into effect substantially as they now stand (Act Apr. 20, 1871, 17 Stat. 13, c. 22; Congressional Globe, 42d Cong., parts 1 and 2). Despite the apparent protestations of Representative Shellabarger, Congress refused to provide for any general survivorship of actions under the Civil Rights Acts, but only adopted in §1986, the restrictive survivorship of actions under §1985 alone.[9] Moreover, once again, there was no attempt to amend in any respect §1988 which had then been in effect for five years.

If the underlying "policies" or "purposes" of the Civil Rights Acts were in fact that all actions under those acts must survive death without any limit or restriction whatever (whether as to wrongful-death or wrongful-injury actions, or designated beneficiaries and dependent kin as distinguished from succession representatives, etc.) - which is, of course, the result inherent in, and dictated by, the lower courts' reasoning - then it is obvious that Congress would

9. See fn. 6, *supra*.

simply have said so in enacting the Civil Rights Acts, and would not have relied on its enactment of §1988 commanding the federal courts to be governed by the common law of the state, as amended by state statutes. Clearly, in so enacting §1988, Congress could not have intended that any limitations on survivorship imposed by those state statutes should be ignored by the federal courts.[10]

To paraphrase this Court in *Moor, supra*, 411 US at p. 709, "in interpreting the statute it is not our task to consider whether Congress was mistaken in 1871 in its view of the limits [as to survivorship]; rather, we must construe the statute in light of the impressions under which Congress did in fact act". It cannot be questioned that in 1871, when Congress was considering the Civil Rights Act, the prevailing law was that an injured party's claim was extinguished upon his death [see *Mich. Cent. R. R. vs Vreeland*, 227 US 59, 67 (1913)].

Moreover, as Judge Brown stated in *Brazier vs Cherry*, "The law has long and frequently stated and restated . . . that amelioration of the harshness of this principle [of non-survivorship] must come from legislation" (293 F2d at p. 403).

Since Congress did not so legislate in enacting the Civil Rights Acts, it was error for the courts below to hold that a policy or "purpose" of absolute survivorship had been embraced in the Civil Rights Acts by Congress which rendered the Louisiana law of survivorship "inconsistent" with that

10. *Cf. Baker vs F & F Investment*, 420 F2d 1191 (CA 7-1970), cert. den. 400 US 821, stating in part: "Congress would surely have spoken more explicitly had it intended that civil rights actions should endure forever." (p. 1196).

law so as to preclude the application of that state law to this action as directed by §1988.

II - THE FIFTH CIRCUIT ERRED IN FABRICATING A FEDERAL COMMON LAW OF ABSOLUTE SURVIVORSHIP OF ACTIONS UNDER §1983

Having refused to apply to this action the Louisiana law of survivorship in favor of certain designated beneficiaries, as dictated by §1988, the Fifth Circuit found itself facing a complete absence of any provision in the Civil Rights Acts for survival of this action, no applicable state statute of survivorship, and a long-established common-law rule of non-survivorship of actions for personal injuries. Undaunted, it proceeded to fabricate a "federal common law" of absolute survivorship of civil rights actions, when no such federal common law had previously existed.

That holding militates against the very positive holdings of the Fifth Circuit itself in *Brazier vs Cherry*, 293 F2d 401 (CA 5-1961), that any "amelioration of the harshness of the principle [the long - and well-established common-law rule of abatement of actions upon death of the injured person] must come from legislation" (p. 403), and that "we are of the clear view that Congress adopted *as federal law* the currently effective state law on the general right of survival. This was done by §1988" (at p. 405 - emphasis supplied).[11]

11. See also *Wolfer vs Thaler*, 525 F2d 977 (CA 5-1976), fn. 1 at p. 978. The holding in *Brazier* served to emphasize, as pointed out in *Holmes vs Silver Cross Hospital of Joliet, Illinois*, 340 F.Supp. 125, 129 (ND Ill.-1972), that "as a matter of statutory construction of 42 USC §§1983 and 1988, state law in relation to survival of actions must be ascertained and adopted as the law governing the issue of survival of a federal civil rights action in the absence of any specific Congressional enactment on the subject" (340 F.Supp. at p. 129). In

"In a federal civil rights action where the person who has been deprived of his right has died, the action survives for the benefit of the estate if the applicable state law creates such a survival action." *Spence vs Staras*, 507 F2d 554, at 557 (CA 7-1974). While sustaining the representative action as surviving under Illinois law, the court dismissed plaintiff's individual action since it did not survive under the state law.

In *Pritchard vs Smith*, 289 F2d 153 (CA 8-1961), the Eighth Circuit, noting that §1983 does not specifically treat with the survival issue and that under §1988, resort should be had to state law, held "that the court should look to the Arkansas law to determine the survival issue here present". Since the Court found the action to be one for "wrongs to the person other than libel and slander", it survived under the Arkansas law. 289 F2d at p. 158.

The Sixth Circuit has held, in *Hall vs Wooten*, 506 F2d 564, 569 (CA 6-1974), that, "following section 1988", the court must "look to state law in fashioning federal common law", and that "we adopt as federal common law, the law of Kentucky, the forum state, which provides for the survival of actions for personal injury [quoting the state statute]. Since none of the exceptions [that is, actions for slander, libel, criminal conversion and malicious prosecution] is applicable here, we hold that the cause of action alleged in this case survived the death of the injured person" (p. 569).

In the relatively recent case of *Dean vs Shirer*, 547 F2d

(footnote 11 - continued)
Holmes, as is true in *Evain vs Conlisk*, 364 F.Supp. 1188, 1191 (ND Ill.-1973), aff'd 498 F2d 1403 (CA 7-1974), plaintiff's claims were dismissed because, under applicable state law, they did not survive in favor of that person .

227 (CA 4-1976),[12] the Fourth Circuit carefully analyzed plaintiff's §1983 claim to determine if it survived under the laws of South Carolina, which it obviously acknowledged as governing the disposition of the case. The court applied the state statute which does not provide for absolute survival, but for survival of only certain types of action. After quoting the South Carolina statute involved, the Fourth Circuit stated that "exceptions to such survivorability (sic) of actions for personal injuries are actions for malicious prosecution, slander, fraud and deceit" 547 F2d at 229. The Fourth Circuit thus recognized that if Dean's action had been in the nature of one for malicious prosecution, slander, fraud or deceit, it would not have survived. Only the appellate court's categorization of the action as one for false imprisonment or assault allowed it to survive.[13]

Even assuming that the appellate court was entitled to look to "federal common law", the court also erred in creating a federal common law of absolute survival of civil rights actions in favor of the personal representative of the deceased. It is well established that at common law - whether state or federal - an action for personal injury does not survive the death of the injured party. "Nothing is better

12. Although *Dean* was actually decided before *Shaw*, it was not published until after the decision below and was not considered by the Fifth Circuit.

13. In the instant case, while it is clear that the action for damages under §1983 would be deemed to be in the nature of one for malicious prosecution [*cf. Allen vs Gifford*, 462 F2d 615 (CA 4-1972), cert. den. 409 US 876 (1972)], there is no question that Shaw's action is of the category which would survive under the law of Louisiana if Shaw would have left a wife, child, father, mother, brother or sister. Because Shaw was not survived by any such designated familial beneficiaries, however, the law of Louisiana dictates that this action does not survive.

settled than that at common law the right of action for an injury to the person is extinguished by the death of the party injured."[14]

The court below relied on the cases of *Lefton vs City of Hattiesburg*, 333 F2d 280 (CA 5-1964), *Sullivan vs Little Hunting Park, Inc.*, 396 US 229 (1969), and *Bell vs Hood*, 327 US 678 (1946), as authority for its "formulation" of federal common law to allow survival of this action (545 F2d 984, 985). However, *Lefton* involved simply a procedural question as to the proper nature of a petition for removal of several criminal prosecutions to federal court to protect petitioners' civil rights, and the language of the decision quoted below as to use of common law powers to facilitate civil rights proceedings referred to the statutory provisions of §1988 (333 F2d at p. 284), which the Fifth Circuit refused to implement in the instant case. Similarly, this Court in *Sullivan vs Little Hunting Park, Inc.*, relied on §1988, stating that "both federal and state rules on damages may be utilized". In *Bell vs Hood*, this Court was considering a narrow issue of jurisdiction to hear a suit for recovery of damages, under "federal question" jurisdiction, for violation of plaintiff's Fourth and Fifth Amendments rights, and observed that when a federal statute provides for a general right to sue for invasion of legal rights, the courts may use "any available remedy" to make good the wrong.

Thus, in all three cases, there was already in existence an "available remedy" or "federal and state rules" to be ap-

14. *Mich. Cent. R. R. vs Vreeland*, 227 US 59, 67 (1913). See *Moor vs County of Alameda*, 411 US 693 at p. 702, fn. 14. In *Pritchard*, 289 F2d 153, 157 (CA 8-1961), the Eighth Circuit stated: "There appears to be no well defined or established federal common law as to the survival of tort actions for the vindication of personal rights."

plied. To the contrary, in this case, there was no existing, available statutory or common-law rule of survivorship.

The opinion below (545 F2d 984) quotes *Jobson vs Henne*, 355 F2d 129, 133 (CA 2-1966) for the rejection of immunity from Section 1983 actions for all state officials, but fails to recognize the numerous areas of immunity which have been carved out in §1983 actions, and which were most recently emphasized by this Court's decision in *Imbler vs Pachtman*, 424 US 409 (1976). *Nelson vs Knox*, 256 F2d 312 (CA 6-1958), cited by the Fifth Circuit (545 F2d 985), concerned itself only with the immunity of city officials under the Civil Rights Act and not with survivorship.

Reliance is placed by the appellate court (545 F2d 984) on the decisions of this Court in *J. I. Case vs Borak*, 377 US 426 (1964) and *Textile Workers vs Lincoln Mills*, 353 US 448 (1957), for the proposition that federal courts will recognize federal common law when it is necessary to carry out the congressional objectives of federal legislation. While the cited cases do stand for that proposition, it is important to note that in both decisions, federal remedies were created for federally defined offenses contained in statutes which make no reference whatsoever to state remedies,[15] and which are thus totally different from the Civil Rights Act which, through §1988, specifically incorporates the law of the forum state.

15. *Case* involved the Securities Exchange Act, and *Textile Workers* discussed remedies under §301(a) of the Taft-Hartley Act.

The two anti-trust cases cited by the Fifth Circuit (545 F2d 985, 986), *Barnes Coal Corp. vs Retail Coal Merchants Ass'n*, 128 F2d 645 (CA 4-1942) and *Rogers vs Douglas Tobacco Board of Trade*, 244 F2d 471 (CA 5-1957), are inapposite because, as stated at p. 648 of the *Barnes* decision, "Whether the action for damages created by the Sherman Act survives is to be determined by an interpretation of the statute". The distinction between the Sherman Act and the Civil Rights Act is obvious; the former does not incorporate state law while the latter, through §1988, defers to the law of the forum state.

The Fifth Circuit's citation (545 F2d 983) of *Pierson vs Ray*, 386 US 547 (1967) for the proposition that consent to an injury is not a defense available under Section 1983 regardless of its availability under State law is a direct misstatement of this Court's holding in *Pierson* that, as a factual conclusion, "We do not agree with the Court of Appeals that they [plaintiffs] somehow consented to the arrest because of their anticipation that they would be illegally arrested . . . the case contains no proof or allegation that they in any way tricked or goaded the officers into arresting them" (386 US 558).

No other court has ever applied "federal common law" to this issue - understandably, since there was none. To the contrary, every court previously deciding survivorship of a §1983 action has, pursuant to §1988, applied the law of the forum state. There is accordingly no precedent whatever for the decision below.

In a further effort to support its creation of a federal common law of survivorship, the Fifth Circuit opined that it

"is desirable because it fosters uniform application of the civil rights laws" (545 F2d 985). If Congress had desired uniform application of the civil rights laws, however, it could have, and would have, expressly provided for survival of a §1983 action. Instead, Congress enacted §1988 which incorporates the law of the particular forum state. In so doing, a legislative decision was made in favor of diversity.

This Court, in considering The Outer Continental Shelf Lands Act which includes a provision, much like § 1988, for adoption of applicable state laws not inconsistent with other federal laws [43 USC 1333(a) (2)], held that "Congress specifically rejected national uniformity and specifically provided for the application of state remedies". *Chevron Oil Co. vs Huson*, 404 US 97, 104 (1971).[16]

The only way there could be any such federal "uniformity" would be through Congress' repeal of §1988 and reversal of the several holdings of the federal courts recognizing the propriety of resort to the state law of survivorship under § 1988 [*e.g., Brazier vs Cherry, Pritchard vs Smith, Hall vs Wooten, Wolfer vs Thaler, Evain vs Conlisk, Holmes vs Silver Cross Hospital, Spence vs Staras, supra*] by an express amendment to the Civil Rights Act.

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16. *Basista vs Weir*, 340 F2d 74 (CA 3-1965), also cited by the Fifth Circuit to support its resort to a new "federal common law", rather than the applicable state law, does not in fact furnish such support. In that case, the court recognized that there was in existence, and had been for many years, a well-recognized body of "federal common law" as to recoverable damages, and that resort to §1988 was not even necessary with respect to the issue of damages. While the validity of that holding is not conceded, it is in any event not apposite here, since it has been recognized universally that there was no survival of actions at common law - state or federal - nor does the Civil Rights Act itself supply any rule of survivorship, so that §1988 must control the court in that regard.

The Fifth Circuit's contention that the federal common law it was creating fostered uniformity, pales in light of the fact that Congress specifically rejected any suggestion of uniform survivorship by enacting §1988, and that there has been no uniformity of survival of §1983 actions under previous decisions. That contention cannot negate the clear and unequivocal language of §1988 establishing the law of the forum state as determinative of the issue of abatement.

It is submitted that there is no basis whatever for a federal common law of absolute survivorship as devised by the court below, but that if any such federal common law is to be formulated, the federal courts should be persuaded, if not bound, by the various federal laws of survival,[17] including §1986 of the Civil Rights Act, all of which, whether relating to wrongful-injury actions or wrongful-death actions, are explicit "in the naming of dependent relatives who may recover and in (providing) the priority given to their claims". [18] The Louisiana law of survival of actions is accordingly entirely consistent with those federal laws of survival since all of the laws name dependent relatives who alone may pursue recovery, and the priority *inter se*.

This Court's decisions cited by the Fifth Circuit (545 F2d 985) are not authority for its holding. Two of the

17. The Federal Employers' Liability Act, 45 USC 59; the Jones Act, 46 USC 688; the Longshoremen's and Harbor Workers' Compensation Act, 33 USC 908; and the Death on the High Seas Act, 46 USC 761, *et seq.* "The policy thus established has become itself a part of our law, to be given its appropriate weight not only in matters of statutory construction but also in those of decisional law." *Moragne vs States Marine Lines, Inc.*, 398 US 375, 390-391 (1970).

18. *Moragne vs States Marine Lines, Inc.*, 398 US 375, 407 (1970). See Addendum 1.

cases, *Cox v. Roth* [19] and *Just vs Chambers*,[20] involved the issue of survival of a cause of action under the Jones Act and the Federal Employers' Liability Act upon the death of the tortfeasor, rather than the injured party. The classes of beneficiaries established by these acts were not at issue in either case.

The Fifth Circuit's attack on limited survival under the FELA through citation (545 F2d 986) to *Dellaripa vs New York, New Haven and Hartford R. Co.*, 257 F2d 733 (CA 2-1958), involves a faulty factual analogy. In *Dellaripa*, the wrongful-death action passed to the surviving father in whose behalf it was brought. The father died during the pendency of action, but the Second Circuit found that §59 of the FELA permitted the claim to survive. It is important to note that, in the case at bar, had Shaw's father survived him, this action could have been maintained by Shaw's father under Louisiana's Civil Code Article 2315.

Van Beeck vs Sabine Towing Co., Inc.,[21] supports petitioner's position that the law of Louisiana should be applied in the instant case. In *Van Beeck*, this Court recognized that, "[t]here being neither wife nor child nor father, the mother was the sole beneficiary of the statutory cause of action", but also recognized, as federal law, the rule, well-established in the state statutes, that the action once having devolved on a designated beneficiary, becomes a property right and passes to the estate of that party.[22]

19. 348 US 207 (1955).

20. 312 US 383 (1941).

21. 300 US 342 (1937).

22. 300 US at p. 343. This is clearly also the law of Louisiana. See Article 2315, La. Civil Code.

The appellate court also cited (545 F2d 983) the case of *Moragne vs States Marine Lines, Inc.*[23] However, *Moragne* involved an admiralty action for wrongful-death caused by unseaworthiness on state waters, as to which this Court had a "special responsibility for fashioning rules" [*Gillespie vs United States Steel Corp.*, 379 US 148, 155 (1964)] and with respect to which Congress had not already preempted that area of the law by enactment of an applicable statute as it has with the passage of §1988 in which it has effectively adopted the state law of survival of actions. Furthermore, this Court expressly reserved determination of the issue as to the beneficiaries who were entitled to recover under the remedy created in the *Moragne* case.[24] Moreover, the appellate court in the instant case failed to consider the recent dual holdings of the Court of Appeals for the Sixth Circuit in *Complaint of Cambria Steamship Co.*,[25] that the survivorship recognized in *Moragne* "exists *primarily* for the benefit of individual [dependent] beneficiaries, and general losses to the estate are not recoverable", and that there is no basis "to hold that a non-dependent and collateral relative should recover for loss of an inheritance, based solely upon his legal relationship to the deceased as next of kin".

Similarly, the appellate court's reliance (545 F2d 985) on *Roberson vs N. V. Stoomvaart Maatschappij*, 507 F2d 994 (CA 5-1975), for the rejection of Article 2315 is totally inappropriate because, as the Fifth Circuit observed in that

23. 398 US 375 (1970). In *Moragne*, this Court pointed out that the Admiralty "developed general principles unknown to the common law" which "included a special solicitude" for seamen (p. 387).

24. 398 US at p. 408.

25. 505 F2d 517 (CA 6-1974), at pp. 523-24, cert. den. 420 US 975.

decision at p. 995, "Federal Maritime Law . . . now can operate to award damages for wrongful death or survivorship directly. No resort to state law is necessary". In the case at bar, resort to state law is mandated by § 1988. There is no such mandate in the general federal maritime law.

The Fifth Circuit, quoting the district court, stated that "we emphasize at the outset that we are not concerned with wrongful-death actions" (545 F2d 983). However, the district court recognized - and the appellate court apparently did not disagree - that the rule under Louisiana Civil Code Article 2315 limiting survival of actions to designated beneficiaries, applies to both wrongful-death and wrongful-injury actions. Thus, were this a wrongful-death action under the Civil Rights Act, the lower courts would apparently have applied the law of Louisiana and have dismissed the action of Shaw's executor, since none of the designated beneficiaries exists.

It seems obvious, however, that there is all the more reason to dismiss the present action which does not arise from a death caused by a civil rights violation, but involves only damages in the nature of malicious prosecution, rather than making those damages recoverable by a non-related, non-dependent residuary legatee who was merely a friend of the original plaintiff.

In sum, there has been in existence no federal common-law of survivorship of civil personal actions - to the contrary, the long-standing rule of common law was that such an action abated with the death of the injured party - and there is no real authority for the federal court now to create a federal common law of survivorship of an action under

§ 1983 of the Civil Rights Act when Congress itself did not see fit legislatively to ameliorate the existing rule, and in fact patently refused to do so, other than by enacting § 1988 of that Act.

The issue which was very forcefully urged upon the Fifth Circuit by the appellants in the *Brazier* case, was that by reason of certain language §1983 itself, Congress had effectively brought into the Civil Rights Act the existing common law of non-survivorship, so that no state statute providing for any modicum of survivorship whatever could be adopted and applied under §1988 since all state survivorship statutes were in conflict with the Act. However, the Court in *Brazier* rejected that argument and held unequivocably that Congress had remained entirely silent as to survivorship of §1983 actions - had left a "gap" in the law. Thus, it concluded that Congress had enacted §1988 to fill that gap insofar as state law will permit.

However, the Fifth Circuit, in this case, while giving lip-service to §1988 and the holding of *Brazier*, and ostensibly following the procedural steps provided in §1988 in looking to state law, now seeks to accomplish indirectly, by the fabrication of a "federal common law", what Congress itself had directly refused to do (except only in §1986 providing for restricted survivorship with respect to actions under §1985)[26] - ameliorate the existing common law as to abatement of actions, and bring into the Civil Rights Act a rule of absolute survivorship of actions under §1983.

26. Comparison of the express provisions in §1986 for survivorship, however limited, of §1985 actions and the complete absence of any such provision in the Civil Rights Act with respect to §1983, and consideration of the Congressional history of the Act and Representative Shellabarger's own criticism of Congress for not having enacted the survivorship provision which he had championed (*supra*, fn. 6), are stark evidence of Congressional intent not to adopt any rules of survivorship except as expressly set out in §1986 and in state statutes to be applied as directed by §1988.

If the rule of absolute survivorship, and the objective of uniformity of survivorship throughout the entire federal system, of civil rights actions under §1983, is so desirable, the solution is quite clear and simple. Such amelioration of existing common law should be brought into the Civil Rights Act through appropriate statutory amendment enacted by the duly-elected representatives of the people, and not by means of judicial legislation by the appointed federal judiciary in creating a new federal common law of absolute survivorship for civil rights actions when none had ever existed.[27]

CONCLUSION

The legal effect of the holding below is to write §1988 right out of the Civil Rights Act. The Fifth Circuit's position is that unless a state law being applied under §1988 provides fully for survival of the action, it will be rejected rather than being extended to and governing the disposition of the case.

In short, if the lower court's decision is maintained, a civil rights action under §1983 will always survive regardless of the situation - *i.e.*, there is absolute survivorship. Such a holding is not consonant with numerous previous decisions. Moreover, if that had been the Congressional intent in enacting the Civil Rights Act, it seems obvious that Congress would simply have so provided in the statute.

27. "Unlike statutes, court decisions do not come into being as a result of electoral processes which give them legitimacy in a democratic society." Winter, *The Growth of Judicial Power*, National Legal Center for the Public Interest, National Conference: "The Role of the Judiciary in a Democratic Society" (1977), p. 42.

The Louisiana law provides for the limited survival of such actions for personal damages. In its legislative wisdom, Louisiana restricted the right to pursue the action past the plaintiff's death, to those closest members of his family -- his spouse, his children, his parents or his brothers or sisters. Contrary to this being in conflict with federal law, it is exactly the same philosophy and policy underlying, and is quite consistent with, every federal statute which provides for any survival of action - including § 1986 of the Civil Rights Act. Thus, whether the action involves an injury to a railroad worker under FELA, a member of a crew of a vessel - that long protected "ward of the Admiralty" - under the Jones Act, a longshoreman or harbor worker, or "invidious discrimination" resulting in death to the person deprived of his civil rights, it survives only in favor of the designated dependent kin.

The law of Louisiana set out in Civil Code Article 2315, is "not inconsistent with the Constitution and laws of the United States", and therefore, under the express mandate of §1988 of the Civil Rights Act, that law "shall be extended to and govern" the courts in the "disposition of the cause".

In enacting the Civil Rights Acts, Congress rejected my provision for survivorship of actions under §1983, other than the incorporation of the state law of survivorship, when such exists, as directed by §1988. As Justice Rehnquist stated in *Jimenez vs Weinberger*, 417 US 628 (1974), "Courtrooms should [not] become forums for a second round of legislative hearings whenever a legislative determination is later challenged" (p. 641).

In the present case, plaintiff Shaw left no surviving

spouse, parent, child, brother or sister, or any other dependent kin. His sole residuary legatee is merely a friend.

However close that friendship may have been, there is no basis for "special solicitude" (*Moragne, supra*, fn. 23), and no authority whatever – in the common law, the federal common law, the Louisiana codal provisions or the federal statutes - for the extention of survivorship of a pending action for personal injury to such a non-dependent, non-relative of the deceased plaintiff.

For all of the foregoing reasons, it is submitted that the judgment below should be reversed and plaintiff's claim dismissed.

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January, 1978

ADDENDUM 1

FEDERAL LAWS OF SURVIVAL

WRONGFUL-INJURY ACTION

STATUTE	BENEFICIARIES
FELA (45 USC 59)	Permits survival of the decedent's wrongful-injury action for the benefit of the surviving widow and children, parents and next of kin dependent on the decedent.
JONES ACT (46 USC 688)	Incorporates provisions of FELA by reference.
LHWCA (33 USC 908)	In the event of death of an employee receiving compensation for permanent partial disability, the total unpaid amount of the award is payable to the surviving widow, child, and dependent grandchildren, brothers, sisters, and other persons who satisfy the definition of the term dependent in 26 USC 152.

WRONGFUL-DEATH ACTION

FELA (45 USC 51)	Creates an action for wrongful death for the benefit of the surviving widow and children, parents, and next of kin dependent on the employee.

JONES ACT (46 USC 688)	Incorporates provisions of FELA by reference.
LHWCA (33 USC 909)	Creates a "death benefit" in favor of surviving widow, child, and dependent grandchildren, brothers, sisters, and other persons who satisfy the definition of the term dependent as defined in 26 USC 152.
DOHSA (46 USC 761)	Creates an action for wrongful death for the benefit of the decedent's wife, husband, parent, child, or dependent relative.

ADDENDUM 2

STATE LAWS OF SURVIVAL

SURVIVAL STATUTE	EXCLUSIONS
Ala. Code Ann. § 6-5-642 (1975)	Excludes actions for injuries to reputation.
Alas. Stat. Ann. §09.55.570 (1962)	Excludes actions for defamation.
Ariz. Rev. Stat. Ann. §14-3110 (1975)	Excludes actions for breach of promise to marry, seduction, libel, slander, separate maintenance, alimony, loss of consortium, and invasion of right of privacy.
Ark. Stat. Ann. §27-901 (repl. ed., 1962)	
Calif. Probate Code §573 (Deering, 1974)	Excludes damages for pain, suffering or disfigurement.
Colo. Rev. Stat Ann. §13-20-101 (1973)	Excludes actions for slander and libel, and damages recoverable are limited to loss of earnings and expenses sustained or incurred prior to death, and does not include damages for pain, suffering or disfigurement nor prospective profits or earnings after date of death. Also excludes punitive damages after death of party against whom claimed.

Conn. Gen. Stat. Ann. §52-599 (1958)	Excludes actions for which the object is defeated or rendered useless by the death of any party thereto and those whose prosecution or defense depends on the continued existence of the persons who are plaintiffs or defendants and civil actions upon a penal statute.
Del. Code Ann. tit. 10, §3701(Rev. 1974)	Excludes actions for defamation, malicious prosecution and actions upon penal statutes.
Fla. Stat. Ann. §46.021 (1969)	
Ga. Code Ann. § 3-505 (rev. 1975)	
Hawaii Rev. Stat. §634-61 (Act 109 of 1973)	
Idaho Code Ann. §5-327 (Supp. 1977)	Excludes actions for slander and libel.
Ill. Ann. Stat ch. 3, §339 (Smith-Hurd, 1961), ch. 110, §54 (Smith-Hurd, 1968)	Excludes actions for slander and libel.
Ind. Ann. Stat. §34-1-1-1 (Burns, 1973)	Recovery for personal injuries limited to medical, hospital and nursing expense and loss of income of decedent resulting from the injury, from the date of the injury to the date of death.

Iowa Code Ann. §§ 611.20, 611.22 (1950)	
Kan. Stat. Ann. §§60-225 60-1801 to 1802 (1976)	Excludes actions for slander, libel, malicious prosecution or for a nuisance.
Ky. Rev. Stat. Ann. § 411.140 (1972)	Excludes actions for slander, libel, criminal conversion, and malicious prosecution.
La. C.C. Article 2315	As to actions other than property damage, excludes recovery by persons other than spouse and/or children, parents, brothers and/or sisters.
Me. Rev. Stat. Ann. tit. 18, § 2501 (Supp. 1977-1978)	Excludes actions for recovery of penalties of forfeiture of money under penal statutes.
Md. Ann. Code CJ § 6-401 (1974)	Excludes actions for slander.
Mass. Ann. Laws ch. 228, §§ 1, 4 (1974)	
Mich. Stat. Ann. §§27A.2921, (rev. 1962) 27A.5852, (rev. 1977)	Actions for injury to the person die with the person in whose favor they exist.
Miss. Code Ann. §91-7-233 (1972)	
Mo. Ann. Stat. §§537.020, 537.030 (1969)	Excludes actions for libel, slander, assault and battery, and false imprisonment.

Mont. Rev. Code Ann. §93-2824 (repl. ed. 1964)	
Neb. Rev. Stat. Ann. §§25-1401, 1410 (reissue, 1975), 25-1402 (reissue 1975)	Excludes actions for libel, slander, malicious prosecution, assault and battery, and for a nuisance.
Nev. Rev. Stat. § 41.100 (1973)	
N.H. Rev. Stat. Ann. §§556:9-15 (repl. ed. 1974)	Excludes actions for recovery of penalties and forfeitures of money under penal statutes.
N.J. Stat. Ann. §§2A:15-3 (Supp. 1977-1978) 2A:15-4 (1952)	
N.M. Stat. Ann. §§21-7-4, 21-7-10 (repl. ed., 1970)	Excludes actions for libel, slander, malicious prosecution, assault and battery, nuisance, and actions against a justice of the peace for misconduct in office.
N.Y. E.P.T.L. §11-3-2 (Supp. 1977-1978)	Excludes recovery of punitive damages and penalties.
N.C. Gen'l. Stat. Ann. §§28A-18.1 (Supp. 1975)	Excludes actions for libel, slander (except slander of title), false imprisonment and where the relief sought could not be enjoyed or granting it would be nugatory after death.

N.D. Cent. Code Ann. §§28-01-26.1, R. Civ. P 25(a) (repl. ed., 1974)	Excludes actions for breach of promise, alienation of affections, libel, and slander.
Ohio Rev. Code Ann. §§2311.21 (Baldwin, 1971) R. Civ. P. 25(a) (Baldwin repl., 1972)	Excludes actions for libel, slander and malicious prosecution, nuisance or against a judge of a county court for misconduct in office.
Okla. Stat. Ann. tit. 12, §§1052, 1080 (Supp. 1977-78)	Excludes actions for libel, slander and malicious prosecution.
Ore. Rev. Stat. § 30.075 (repl. 1975)	Damages recoverable for injury to the person must not exceed $25,000 and are limited to reasonable expenses paid or incurred for doctor, hospital or nursing services for the deceased and for his loss of earnings.
Pa. Stat. Ann. tit. 20, §§ 3371, 3373 (Purdon, 1975)	Excludes actions for slander or libel.
R.I. Gen'l. Laws Ann. §§9-1-6, 9-1-7 (reenactment, 1969)	
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S.D. C.L. §§15-4-1, 15-4-2 (1967)	
Tenn. Code Ann. §§20-605 (1955), 20-602 and 607 (1977 Supp.)	Excludes actions for wrongs affecting the character of the plaintiff.
Tex. Rev. Civ. Stat. §5525 (Vernon, 1958)	
Utah Code Ann. §78-11-12 (Supp. 1975)	Excludes claims for pain and suffering.
Vt. Stat. Ann. tit. 14, §§ 1451-52 (repl. ed., 1974)	
Va. Code Ann. §§8.01-22 8.01-25, 8.01-50 (repl.ed. 1977)	Excludes punitive damages after death of party causing the injury.
Wash. Rev. Code Ann. § 4.20.046 (1962)	Excludes recovery for damages for pain, suffering, anxiety, emotional distress, humilitation, personal to and suffered by deceased.
W. Va. Code Ann. §55-7-8a (1966)	
Wisc. Stat. Ann. §§269.13 (1957) 287.01 (Supp. 1977-1978) 895.01 (Supp. 1977-1978)	Excludes actions for slander or libel.
Wyo. Stat. Ann. §§1-26 to 28 (1957)	

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-178

WILLARD E. ROBERTSON,
Petitioner

versus

EDWARD F. WEGMANN, EXECUTOR FOR CLAY L. SHAW, ET AL.,
Respondents

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77 - 178

WILLARD E. ROBERTSON,

Petitioner

versus

EDWARD F. WEGMANN, EXECUTOR FOR
CLAY L. SHAW, ET AL

Respondents

ON WRIT OF CERTIORARI TO THE COURT OF
APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS

The decision of the United States District Court for the Eastern District of Louisiana is reported at 391 F. Supp. 1353, and appears as APPENDIX D to the petition (page 32). The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 545 F. 2d 980 and is reproduced as APPENDIX A to the petition for certiorari (page 14).

JURISDICTION

The opinion and judgment of the Court of Appeals was entered on January 24, 1977 and the order denying the request for rehearing was entered on June 20, 1977. The

petition for certiorari was filed on August 1, 1977 and granted December 5, 1977. The jurisdiction of this Court rests on 28 USC 1254(1).

STATUTES INVOLVED

The statutes involved are as stated at page 2 of the brief on behalf of the petitioner.

QUESTIONS PRESENTED

Respondent does not agree with petitioner's presentation of the questions presented and submits that the questions presented are:

1) There being no Federal statutory law of survival of Civil Rights actions, does this lack of survival make the Federal law "deficient in provisions necessary to furnish suitable remedies" for Civil Rights violations?

2) Whether this pending action for damages sustained by plaintiff, Clay L. Shaw, prior to his death survives in favor of the substituted plaintiff, the personal representative of his succession, Edward F. Wegmann, the duly qualified testamentary executor of the Succession of Clay L. Shaw, the original plaintiff, as a matter of Federal common law?

STATEMENT OF THE CASE

The trial court correctly and accurately stated the case, the course of the proceedings conducted in the lower court, and the facts relevant to the issues presented for review (APPENDIX D, p. 32). For additional facts pertaining to the

case, see *Shaw v. Garrison*, 328 F.Supp. 390 (E.D. La. 1971, affirmed 467 F.2d 113, 5th Cir. 1972), most especially the trial court's findings of fact and conclusions of law as set forth in said opinion.

It is interesting to note that Garrison and the other defendants, including the petitioner, have taken great umbrage at the fact that the trial court saw fit in writing its opinion to outline in some detail the present posture of this litigation, which, as it was termed by the trial court, and by many other writers, "one of the most bizarre episodes in American political and legal history". The background of this litigation is essential to a complete understanding of the case, and any statement of the case which does not include a detailed account of the background of the litigation, would be incomplete if, as was held by the trial court, ". . .Shaw surely deserves an opportunity to have his day in court and attempt to clear his name, if only post-humously". The court must have full knowledge of the background of the litigation.

Petitioner and his co-defendants have been highly critical of the trial court's opinion resulting in the issuance of an order denying their motion to dismiss. A reading of the trial court's opinion will reflect that it is a well-reasoned opinion which accurately states the facts of the case, and after a detailed and analytical review of the statutes and jurisprudence, rightfully concludes that there is no impediment to the creation of a Federal common law of survival in Civil Rights actions in favor of the personal representative of the deceased.

The appellate court agreed with the trial court and borrowed liberally from Judge Heebe's reasoning in his opinion.

The appellate court termed the facts of the case Kafkaesque. Very briefly stated the late Clay L. Shaw, through his Executor, respondent herein, charges that former District Attorney, Garrison, and other defendants, including petitioner, Robertson, and other citizens of New Orleans, deprived Shaw of his Civil Rights by improperly and illegally linking him with the Kennedy assassination and by conducting, as well as financing, a well publicized investigation and prosecution of him for his alleged role in the Kennedy assassination. The question presented to the court arises because Shaw died after the damage suit was initiated on his behalf, but before the matter was brought to trial. Subsequent to Shaw's death, Edward F. Wegmann, respondent herein, the testamentary executor of Shaw's succession, was substituted as party plaintiff. The original style of the case was, and is, "Clay L. Shaw vs. Jim Garrision, et al", No. 70-466 of the docket of the United States District Court for the Eastern District of Louisiana.

The Fifth Circuit, as did the trial court, held that in view of the fact that the law of Louisiana does not provide for survival of this Civil Rights action, because plaintiff Shaw did not leave any of the designated familial beneficiaries, it was inconsistent with the policy or purposes of the Civil Rights Act and would be rejected, (545 F.2d at 983), and held that the action did survive under the Federal common law of survival in Civil Rights actions in favor of the personal representative of the deceased. The court further stated ". . .such a holding seems required by the policies underlying the Civil Rights laws and the Supreme Court's treatment of survival of actions in analygous contexts."

The defendant, Willard Robertson, petitioned this court for certiorari which was granted on December 5, 1977.

ARGUMENT

I. THE LOUISIANA LAW OF SURVIVORSHIP IS INCONSISTENT WITH SECTION 1988 OF THE CIVIL RIGHTS ACT, AS A RESULT OF WHICH THE COURT OF NECESSITY APPLIED THE FEDERAL COMMON LAW

The Fifth Circuit properly concluded, as did the trial court, that "because Louisiana's survivorship provisions would cause Shaw's pending Civil Rights action to abate, we find that Louisiana law is inconsistent with the broad, remedial purposes embodied in the Civil Rights Act", and decided that it should "decline to apply Louisiana law of survival" (545 F.2d 983). The Fifth Circuit likewise found that the Federal law is silent as to survival of Civil Rights actions and that it must look to the State law as directed by Section 1988. Since the State law would not allow the action to survive, the court refused to apply the State law and held that under the Federal common law, there was an absolute right of survivorship of Civil Rights actions under Section 1983.

The issue before the court involves the interpretation, as well as the application, of 42 USC 1988, which provides:

> "The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Chapter in Title 18 for the protection of all persons in the United States in their civil rights and for their vindication shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or, are defi-

> cient in the provisions necessary to furnish suitable remedies, and punish offenses against law, the common law, as modified and changed by the Constitution and statutes of the state wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty."

All concerned agree that the Civil Rights Act is silent as to the survival of actions under Section 1983. Petitioner contends that since the Act is silent as to survival of Section 1983 actions, Congress mandated the courts to apply the State law of survival. If Louisiana's Survival Statute, Article 2315 of the Louisiana Civil Code is applied to Shaw's case, the cause of action would abate. *J. Wilton Jones v. Liberty Mutual Insurance Co.*, 248 So.2d 878 (La. App. 4th Cir. Dec. 1970). Respondent's position is quite simple. The State law is "inconsistent with the Constitution and laws of the United States..." and should not be extended to and govern the court in the trial of this case. The State law is to be applied only if it is hospitable to the claimant. If the State law of the forum state is inhospitable to the survival of the claim, the Federal common law which permits survival, is to be applied.

The courts having recognized that there is a "gap" and a "deficiency" in Section 1988 by virtue of its failure to provide for survival of a Civil Rights action, State law is to be applied only if it is hospitable to respondent's claim. *Brazier v. Cherry*, 293 F.2d 401, CCA 5 1961; *Moor v. County of Alameda*, 1973, 411 US 693, 702, 93 S.Ct. 1785, 36 L.Ed. 2d 596.

Both the trial court and the circuit court found that Louisiana's law is inconsistent with the Broad, remedial purposes of the Civil Rights Act, and declined to apply the Louisiana law of survival, since to do so, would leave the plaintiff without a remedy in either the Federal or State courts. The court said:

> "Because Louisiana's survivorship provisions would cause Shaw's pending Civil Rights action to abate, we find that Louisiana law is inconsistent with the broad, remedial purposes embodied in the Civil Rights Acts - laws designed to insure to all citizens 'the right to be free from deprivation of Constitutional Civil Rights' ". *Brazier v. Cherry*, 293 F.2d at 409. We therefore decline to apply the Louisiana Law of Survival. As the Supreme Court said in *Moor v. County of Alameda* (Section 1988) expressly limits the authority granted Federal courts to look to the common law, as modified by State law, to instances in which that law is not inconsistent with the Constitution and laws of the United States. 411 US 706, 93 S.Ct. at 1794. The phrase 'laws of the United States' must be read to encompass the Civil Rights Statutes. It would be specious reasoning at best to suggest that Congress was concerned about the possibility that in enforcing the Civil Rights Statutes, State law inconsistent with tangenital Federal law might be relied upon, but was not concerned about the possibility of hostile State law interferring with carrying out

the purposes of the Civil Rights Acts themselves. See *Monroe v. Pape*, 1960, 365 US 167, 81 S. Ct. 473, 5 L.Ed. 2d 492."

It is well established that the policy of the Civil Rights Laws favors survival of the action. The Louisiana statute limits the classes of persons in favor of whom an action can survive. Hence, as was stated by the trial court, "....this policy of limiting the classes of persons in favor of whom an action survives (is) equally inconsistent with the Federal Civil Rights Laws."

No where in Section 1988 is it stated that the Federal courts are bound by an inhospitable State law. Quite to the contrary, Section 1988 makes it implicit that the law of the State in which the Federal Court has jurisdiction, must not be inconsistent with the Constitution and laws of the United States. Nor does the Section express restrictiveness or exclusiveness.

The need to provide for survival of Civil Rights actions is particularly acute in cases such as this, where the deceased plaintiff's Federal Constitutional rights were misused and abused by a prosecuting attorney acting in concert with his co-conspirators, in bad faith, with no hope of successful prosecution of the criminal charges which the prosecuting attorney caused to be filed against him. The extent to which the prosecuting attorney, Garrison, acting in concert with his co-conspirators, including the petitioner herein, abused and misused the powers of his office of District Attorney in direct violation of the Federally guaranteed rights of Shaw, are shown with clarity in the Conclusions of Fact of Judge Christenberry in the case of *Shaw v. Garrison*, 328 F.Supp. 390.

Commenting on the Circuit Court's decision, William H. Theis, Assistant Professor of Law, Louisiana State University, said:

"The Federal Courts post-Erie Development of Federal common law, makes unlikely the survival of the assumptions codified in Section 1988. In cases other than Civil Rights cases, the trend of the decisions is to fill the gaps in Federal statutory schemes with Federal common law, or with State law, without regard to the latter's character as statutory or decisional. If State law, whatever its source, conflicts with overriding Federal policy, although not directly with a Federal statute, then it must give way. Shaw's reading of Section 1988 parallels this development found in other areas; 'inhospitable' State statutes may be discarded. It is this office's projection that any State statute, other than a statute of limitations, which inhibits plaintiff's case more than would Federal common law, will be found 'inhospitable'. Generally, state statutes have been considered only for the beneficial effect they would have on the plaintiff's case. If the Federal policy in favor of the protection of Civil Rights is a strong one, as the Federal courts frequently insist, then local concerns reflected in State statutes that stand to bar or diminish plaintiff's chances of recovery will likely give way. *Sullivan v. Little Hunting Park* clearly contemplates that all state damages rules, even those found in statutes, must give way to Federal rules, decisional as well as statutory, that better advance Federal policy."

SHAW V. GARRISON: Some observations on 42 USC Section 1988 and Federal Common Law, 36 La. Law Review, 681.

Faced with the dilemma of an inhospitable State law, and a deficient Federal statute, the trial court, as well as the circuit court, solved the dilemma by holding that the old common law of abatement was no longer controlling. It likewise found that the trend of the decisions of this court is in favor of survival of Civil Rights actions. See *Van Breck v. Sabine Towing Co.*, 300 US 342, 57 S.Ct. 452, 81 L.Ed. 685, 1937; *Just et al v. Chambers, Executrix*, 312 US 383, 61 S.Ct. 687, 85 L.Ed. 903; *Cox, et al, Administrators, et al v. Roth, Administrator*, 348 U.S. 207, 75 S.Ct. 242, 99 L.Ed. 260, 1955.

Congress did not create enforceable Civil Rights, such as those provided for under the statutes applicable to this case, to allow the state to destroy those rights or preclude them as would be the case here, if Article 2315 of the Louisiana Civil Code is applied. To apply Article 2315 is to destroy the Civil Rights action provided for by Congressional mandate. The holding of the circuit court is just and equitable. It serves to carry out the policies of Congress in the enactment of the Civil Rights Act. It allows and permits vindication of Civil Rights and Federally guaranteed rights. It produces uniformity. The decision of the trial court, as well as that of the circuit court, allows Clay L. Shaw to Rest in Peace It allows Clay L. Shaw to have his day in court and seek to vindicate his character, his name, and his reputation which the District Attorney, Garrison, and his co-conspirator, Robertson, the petitioner herein, sought to destroy as a result of their actions against him as set forth in the com-

plaint. Louisiana Survival Law should not be allowed to abrogate the achievement of justice.

The court has the right and in fact was authorized and instructed by the Congress to fashion a remedy which would grant relief to the citizen whose Federal rights have been impaired. The common law as modified and changed by the Constitution and statutes of the forum state is to be applied, but only if it is not inconsistent with the Constitution and laws of the United States. The statute itself makes reference to the Federal common law, the existence of which is challenged by the petitioner. Section 1983 is the primary vehicle for protection of the citizen's Federally guaranteed rights. It provides a cause of action created by Congress which instructs the judiciary to apply the common law or the state law, whichever may be required in order to protect the citizen's Federal rights. The history and purpose of Section 1983 and its nature as a Federal cause of action to protect Federal Constitutional rights dictates that the courts ought to rely on state law for answers to Constitutional common law, only if that state law adequately protects the citizen's Federal rights. The state law is to be applied only if it accomplishes that purpose. Should Congress be dissatisfied with the manner in which the mandate is carried out by the courts, it has ample power to alter the judicary's answers by legislative enactment. To the extent that the court chooses to follow state law, that decision is one which embraces and incorporates State law for purposes of Federal law. The State law is not operative of its own force. Any State law which conflicts with the overriding Federal statute must give way. It is incumbent on the Federal courts to delineate the nature and substance of the citizen's rights under Section 1983. It is neither judicial fiat nor judicial lawlessness. To

the contrary, it is judicial implementation of the purposes of a very important and significant piece of Congressional legislation. In Section 1983 cases, appropriate State law serves as a convenient and easy reference point which in some, but not all, instances will settle the matter. However, should the State provision only restrict or impede the purposes of Section 1983, Federal courts may disregard the State law. The State law does not apply of its own force, but is utilized by the Federal court only if it serves to implement and carry out the intent and purposes of Section 1983. That such is the case was recognized by this court in *Sullivan v. Little Hunting Park, Inc.*, 90 S. Ct. 400 (1969), 396 US 229, wherein the court said:

> "We held in *Jones v. Alfred H. Mayer Co.* that although Section 1982 is couched in declaratory terms and provides no explicit method of enforcement, a Federal court has power to fashion an effective equitable remedy. 392 US at 414 n. 13, 88 S.Ct. at 2189. That Federal remedy for the protection of a Federal right is available in the State court, if that court is empowered to grant injunctive relief generally, as is the Virginia court. VA Code Annotated Section 8-610 (1957 Repl. Vo.)".

Again the court said:

> "Where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well gettled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." Id. at 684, 66 S.Ct. at 777.

> "The existence of a statutory right implies the existence of all necessary and appropriate remedies. *Texas & N.O.R. Co. v. Brotherhood of Railway & SS Clerks*, 38 US 548, 569-570, 50 S.Ct. 427, 433-434, 74 L.Ed. 1034. As stated in *Texas & Pacific RR Co. v. Rigsby*, 241 US 33, 39, 36 S.Ct. 482, 484, 60 L.Ed. 874: 'A disregard of the command of the statute is a wrongful act and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover damages from the party in default is implied....."

In the case of *Mitchum v. Foster*, 92 S.Ct. 2151, 40 US 225, 32 L.Ed. 2d 705 (1972), the court stated:

> "Section 1983 was originally Section 1 of the Civil Rights Act of 1871. 17 Stat. 13. It was 'modeled' on Section 2 of the Civil Rights Act of 1866, 14 Stat. 27, and was enacted for the express purpose of 'enforcing the Provisions of the Fourteenth Amendment', 17 Stat. 13. The predecessor of Section 1983 was thus an important part of the basic alteration in our federal system wrought in the Reconstruction era through federal legislation and constitutional amendments. As a result of the new structure of law that emerged in the post-Civil War era - and especially of the

Fourteenth Amendment which was its centerpiece, the role of the Federal Government as a guarantor of basic federal rights against state power was clearly established. ***Section 1983 opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation.

***

"Section 1983 was thus a product of vast transformation from the concepts of federalism that had prevailed in the late 18th century when the anti-injunction statute was enacted. The very purpose of Sec. 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights - to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial'. Ex parte Virginia, 100 US 339, 25 L.Ed. 676 ***" *Monroe v. Pape*, 365 US 167, 81 S.Ct. 473. 5 L.Ed. 2d 492 (1961).

The district courts have held:

"***A cause of action at least for equitable relief, can be stated under Sec. 1983 against individuals whose acts under color of law result in denial of equal protection and due process..." *Lessard v. Van Dale*, 318 F.Supp. 74 (1970).

"Sec. 1983 protects only federal rights that are violated under color of state law.***That is, the plaintiff must show that the defendant, while acting under color of state or local authority, subjected to the plaintiff, or caused the plaintiff to be subjected, to the deprivation of any rights, privileges, or immunities secured to the plaintiff by the Constitution and laws of the United States.*** *Glass v. Hamilton County, Tennessee*, 363 F. Supp. 241 (1973).

"***Both 42 USC, Sec. 1983, creating a cause of action, and 28 USC, Sec. 1343(3), its jurisdictional counterpart, refer to deprivations committed by a person acting under color of State law. It has been recognized that Congress in enacting Sec. 1983 meant to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official abuse of his position.***" *O'Brien v. Galloway*, 362 F.Supp. 902 (1973).

"It is proper for a person adversely affected to bring an action under 42 USC Sec. 1983 on the grounds that he has been denied his rights under the equal protection clause of the constitution. The equal protection clause is directed to every form of state action - legislative, executive, or judicial.***" *Shock v. Tester*, 405 F.2d 852 (1969).

There can be no doubt that these statutes granted Clay L. Shaw the right to proceed as he did against Garrison and his co-conspirators, including Robertson, for deprivation of his Federally guaranteed rights. His fate was to die before

trial. To grant such a cause of action for protection of Shaw's Federal rights, and then not to permit a personal representative to carry on in the place and stead of the deceased, is to do a vain and useless thing. Death would destroy redress and vindication of rights. Damages suffered would be obliterated. Certainly this was not the intent of Congress.

It has long been the policy of this court to deny abatement. In many instances, the court has permitted the continuance of an action commenced by a victim who died before trial, the administrator or executor of the estate of the deceased being substituted as a party-plaintiff. Instances of the denial of abatement are present in the cases of *Van Breck v. Sabine Towing Co.*, 300 US 342, 81 L.Ed. 685, 57 S.Ct. 452 (1937); *Just, et al v. Chambers, Executrix*, 312 US 383, 85 L.Ed. 903, 61 S.Ct. 687 (1941); *Cox, et al, Administrators, et al v. Roth, Administrator*, 348 US 207, 75 S.Ct. 242, 99 L.Ed. 260 (1955).

Again, in *Brazier v. Cherry*, supra, the Fifth Circuit stated:

> "At every turn the Supreme Court, by drawing on available state legislation or giving a broad liberal effect to federal statutes has found a way to make compensation effective despite statutory language which might have made non-survival plausible, if not probable, during an earlier era. In *Just v. Chambers*, 1941, 312 U.S. 383, 61 S.Ct. 687, 85 L.Ed. 903, the court as to the related problem of survival of the cause of action after the death of the tort-feasor held that admiralty could call upon the local (Florida) law. In *Cox v. Roth*, 1955, 348 US 207, 75 S.Ct. 242, 99 L.Ed. 260, the

> question was the survival of a claim under the Jones Act, 46 USCA Sec. 688, on the death of the tort-feasor. Since liability imposed against the vessel owner under the Jones Act rests on the incorporation of F.E.L.A. 45 U.S.C.A. Section 51 et seq. the court was faced squarely with the bald fact that the basic Act had no provision for survival against the tort-feasor. Nevertheless the dominant approach of the Court was that '***welfare legislation*** is entitled to a liberal construction to accomplish its beneficent purposes'*** What could be said of the 'extreme harshness of the old common-law rule abating actions on the death of the tort-feasor' may be more than said as to the victim and his dependents. Likewise, may it be said that this rigor of the common law 'flies in the face of the express congressional purpose to provide for 'protection of citizens against unconstitutional deprivation of their fundamental civil rights. The Court's awareness there that 'literal application of the words of F.E.L.A. would result in the denial of recovery against the personal representative of the tort-feasor' was not permitted to 'frustrate the congressional purpose'***".

II. TO APPLY AN INHOSPITABLE STATE LAW OF SURVIVAL TO RESPONDENT'S CIVIL RIGHTS ACTION UNDER SECTION 1988 IS TO DENY RESPONDENT HIS FEDERAL GUARANTEE OF EQUAL PROTECTION OF THE LAW.

The Fifth Circuit in holding that Shaw's claim against the

District Attorney and his co-conspirators did not abate has settled the question of survival and abatement and rightfully held that the claim does not abate and the substitution of Shaw's personal representative to carry on in his place and stead is the proper procedure. There must be uniformity in the protection of the citizen's rights and in the enforcement of the rights granted to the citizen under the Civil Rights Laws. Certainly it cannot be contended that there is any uniformity in the survival statutes of the various states. There being no uniformity among the various states with respect to survival and abatement, a denial of equal protection of the laws is precipitated. Article 2315 of the Louisiana Civil Code with respect to the right of survival and a personal representative is not uniform with the provisions of many other states.

It was stated in *Basista v. Weir*, 340 F.2d 74 (1965):

> "The Civil Rights Acts were brought into being at a critical time in the history of the United States following the Civil War. They were intended to confer equality in civil rights before the law in all respects for all persons embraced within their provisions. We believe that the benefits of the Acts were intended to be uniform throughout the United States, that the protection to the individual to be afforded by them was not intended by Congress to differ from state to state, and that the amount of damages to be recovered by the injured individual was not to vary because of the law of the state in which the federal court suit was brought. Federal common law must be applied to effect uniformity, otherwise the Civil Rights Acts would fail to effect the purposes and ends which Congress intended."

This Court has established the principle that the Equal Protection Clause does not make every minor difference in the application of laws to different groups a violation of the Constitution. Invidious distinctions, however, cannot be enacted without a violation of the Equal Protection Clause, and in determining whether or not a state law violates the Equal Protection Clause, the court must consider the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification. *William v. Rhodes*, 393 US 23, 89 S.Ct. 5, 21 L.Ed. 2d 24 (1968); *Salyer Land Co. v. Tulare Lake Basin Water Stor. Dist.*, 68 S.Ct. 1224 (1973). The Constitutional standard under the Equal Protection Clause is whether the challenged state action rationally furthers a legitimate state purpose or interest. *McGinnis v. Royster*, 93 S.Ct. 1055, 1059, 35 L.Ed. 2d (1973); *San Antonio Independent School District v. Rodriguez*, 93 S.Ct. 1278 (1973). *See Jimenez v. Weinberger*, 94 S.Ct. 2496 (1974); *Frontiero v. Richardson*, 93 S.Ct. 1764 (1973).

Respondent submits that no legitimate state purpose or interest is manifested by applying the restricted and limited provisions of Article 2315 of the Louisiana Civil Code to him. Applying the provisions of the Article to the effect that the right to sue for damages suffered by a deceased resides in the surviving spouse and child or children, surviving father and mother of the deceased, or either of them, if the deceased left no spouse or child or children, and brothers and sisters, if the deceased left no spouse, parents or children, to the present testamentary executor, would be an unconstitu-

tional application of the Article, thus defeating the purpose of the Civil Rights Act and depriving respondent of due process and equal protection of the laws. *American Party of Texas v. White*, 94 S.Ct. 1296 (1974); *Vlandis v. Kline*, 93 S.Ct. 2230 (1973).

To decide whether a law violates the Equal Protection Clause, the court must in essence look to three things: The character of the classification in question; the individual interest reflected by the classification; and the governmental interests asserted in support of the classification. *Dunn v. Clumstein*, 405 US 330, 92 S.Ct., 31 L.Ed. 2d 274 (1972). It is therefore the duty of the courts to be watchful for constitutional rights of its citizens and against any stealthy encroachments thereon. *Coolidge v. New Hampshire*, 403 US 443, 91 S.Ct. 2022 (1971). Cf. *Central Hardward v. NLRB*, 407 US 539, 92 S.Ct. 2238, 33 L.Ed. 122 (1972). It follows that the existence of a statutory right implies the existence of all necessary and appropriate remedies. *Sullivan v. Little Hunting Park, Inc.*, supra. A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose special benefit the statute was enacted, the right to recover the damages from the party in default is implied. *Texas & P.R. Co. v. Rigsby*, 241 US 33, 37 S.Ct. 482, 60 L.Ed. 874 (1916).

Respondent reiterates that Section 1988 does not mandate that the law of Louisiana apply to this case in its restricted and limited provisions of survival. To the extent that there is a question as to whether the testamentary executor can be substituted as party plaintiff, respondent contends that Article 2315 of the Louisiana Civil Code is not consistent with the Constitution of the United States and the jurisprudence pertaining thereto.

Section 1982 clearly permits the testamentary executor or personal representative of the deceased to be substituted as party plaintiff and continue the action filed by the victim before his death. Clay L. Shaw had a statutory right which he exercised and which requires a remedy; the remedy can now only be secured by his executor. This is a just and equitable conclusion.

The law of Georgia provides that no action for a tort shall abate by the death of either party. It survives even in the personal representative. Georgia Code, 3-505. In *Brazier v. Cherry*, supra, the Court of Appeals for the Fifth Circuit held that a Civil Action against Georgia police officers for the wrongful death of her husband could be brought by the surviving wife as administratrix of his estate. The court stressed the right of the personal representative to proceed for damages and discussed at length the questions of abatement and survival. While the court did recognize the Georgia state law, the case must be considered and analyzed for its federal philosophy as well as its invocation of Section 1988. To deny Shaw's personal representative to interpose himself as the plaintiff in Shaw's cause of action against those who deprived him of his federally guaranteed rights under color of state law, would be to deny him his Constitutional rights of due process and equal protection of the laws.

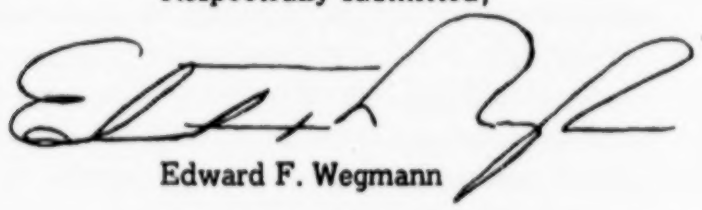
It is readily apparent from a study of the state survival statutes included in petitioner's brief as Addendum #2, page 32, et seq., that there is no uniformity whatsoever in the state survival statutes, as a result of which, if the forum state statute of survival is applied to a Section 1983 action, there is

no equal protection of the law to all citizens for the protection of their federally guaranteed rights. In Georgia, as in many other states, the action does not abate by the death of either party. It survives even in the personal representative of the decedent. Such is not the case here, if Louisiana law is applied, since the respondent, the injured party, Clay L. Shaw, resided in the State of Louisiana, and under Louisiana law, the action does not survive in his personal representative. The Fourteenth Amendment guarantees equal protection of the laws, regardless of domicile.

CONCLUSION

For the foregoing reason, it is submitted that the judgment below should be affirmed.

Respectfully submitted,



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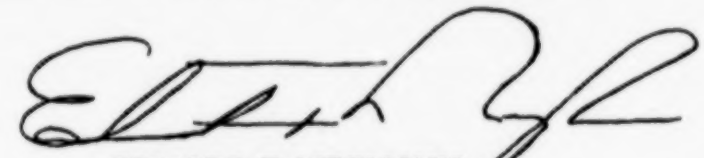
CERTIFICATE OF SERVICE

New Orleans, Louisiana
February 16, 1978

I hereby certify that I have this day served three copies of the foregoing brief, of the respondent Edward F. Wegmann, Executor for Clay L. Shaw, in response to the application of Willard E. Robertson for certiorari to the Court of Appeals for the Fifth Circuit, by placing same in the United States Mail, postage prepaid, addressed to Messrs. Malcolm W. Monroe, 47th Floor, One Shell Square, New Orleans, LA 70139; Lawrence D. Wiedemann, 841 Carondelet Street, New Orleans, LA 70112; Joseph M. Rault, Jr., 234 Loyola Avenue, New Orleans, LA 70112; Richard C. Baldwin, One Shall Square, New Orleans, LA 70139; Peter J. Butler, American Bank Building, New Orleans, LA 70130; and Jim Garrison, 710 Carondelet Street, New Orleans, LA 70130, and/or all interested individuals at their post office address.



EDWARD F. WEGMANN

Supreme Court, U. S.
FILED
MAR 14 1978
MICHAEL RODAK, JR., CLERK

FOR ARGUMENT

In the Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-178

WILLIARD E. ROBERTSON,
Petitioner

versus

EDWARD F. WEGMANN, EXECUTOR FOR CLAY L. SHAW, *ET AL.*,
Respondents

On Writ of Certiorari to the Court of Appeals For The Fifth Circuit

PETITIONER'S REPLY BRIEF

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-178

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Petitioner

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For The Fifth Circuit

PETITIONER'S REPLY BRIEF

I - REPLY TO RESPONDENT'S BRIEF

Respondent's brief raises two constitutional points which neither the district court nor the Fifth Circuit apparently considered significant since neither was discussed in their opinions. [1]

1. Respondent also urges that Shaw should be permitted "to have his day in court and seek to vindicate his character, his name and his reputation". Resp.Br. at 10. But under our judicial system, it must be concluded that with Shaw's acquittal, as well as the subsequent judgment in his favor permanently enjoining his further prosecution, *Shaw vs Garrison*, 328 F.Supp. 390 (ED La.-1971), aff'd 467 F2d 113 (CA5-1972), cert. den. 409 US 1024, he has already been "vindicated" while still living. What is actually being sought by Respondent in this proceeding are money damages, nothing more.

A - THE EQUAL PROTECTION CLAUSE DOES NOT GUARANTEE UNIFORM SURVIVORSHIP

Respondent states that "There being no uniformity among the various states with respect to survival and abatement, a denial of equal protection is precipitated" (Resp. Br. at 18).

Respondent's argument is clearly both inapposite and incorrect, for, carried to its logical conclusion, such reasoning would hold unconstitutional every federal statute,[2] including §1988,[3] which incorporates state law.

It is central to American federalism that the Constitution permits the legal systems of the states to operate unless preempted by Congress.[4] The Constitution outlines a delegation of federal powers, leaving to Congress a broad discretion to decide whether the power should be exercised by it. Having this discretion not to act at all, Congress has discretion to act incompletely and permit state law to fill the interstices of federal law.[5]

The Civil Rights Act is an example of interstitial law since it is not a complete and self-sufficient body of law. Congress

2. See, *e.g.*, the Federal Tort Claims Act, 28 USC 2674; the Outer Continental Shelf Lands Act, 43 USC 1333(a)(2); the Immigration and Naturalization Act, 8 USC 1101(b)(1), (c)(1); and the Social Security Act, 42 USC 416(h)(1).

3. Respondent does not contest the constitutionality of §1988.

4. For example, the latent power of Congress to legislate over commerce does not preempt all state laws regulating commerce. See *Florida Lime & Avocado Growers, Inc. vs Paul*, 373 US 132 (1963).

5. When Congress exercises a granted power, the federal legislation may displace state law under the Supremacy Clause, although it does not necessarily end all state authority. The federal enactments cited in fn.2, *supra*, are examples of the latter proposition.

has expressly provided in §1988 for the filling of the interstices of the Civil Rights Act, such as survivorship of actions under §1983, by adopting state law to fill the gaps in the act.[6] To the extent that the laws of suvivorship vary among the states, the resulting lack of uniformity is required by the Congressional mandate in §1988 to apply state law.[7]

Moreover, "it is proper . . . that with respect to the statute of limitations and the survival of the action, the considerations of using a modern and comprehensive body of state law should outweigh the considerations of defining the scope of federal rights uniformly throughout the nation".[8]

B - THE CLASSIFICATION OF BENEFICIARIES IN CIVIL CODE ARTICLE 2315 DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE

Respondent correctly states that "This Court has established the principle that the Equal Protection Clause does not

6. 42 USC 1988 (see pp. 6-15 of Petitioner's main brief). State law has been expressly adopted by Congress to fill the interstices of other federal laws. See fn. 2, *supra*.

7. See also Petitioner's main brief at 20-22. The limitations period applicable to civil rights actions also varies among states: *e.g.*, the Louisiana limitation period of one year was applied to an action brought under the Civil Rights Act in *O'Sullivan vs Felix*, 233 US 318 (1914), while the New Jersey limitation period of two years was applied in *Hughes vs Smith*, 389 F2d 42 (CA 3-1968). There has never been in these cases, or in any others so far as counsel is aware - and cannot really be - any holding or suggestion by the courts that such non-uniformity renders unconstitutional either the state laws themselves, or the application of those statutes to the Civil Rights Act whether under §1988 or otherwise.

8. See *Choice of Law Under Section 1983*, 37 U. of Chi. L. Rev. 494 (1970) at p. 506.

make every minor difference in the application of laws to different groups a violation of the Constitution", but argues that "no legitimate state purpose" is manifested by applying Article 2315 (Resp. Br. at 19).

Respondent's argument falls on four counts. First, if the classification of beneficiaries in Article 2315 is unconstitutional under the Fourteenth Amendment, it would follow that the similar classification of beneficiaries in the Federal Employer's Liability Act, the Jones Act, the Longshoremen's and Harbor Workers' Compensation Act and the Death on the High Seas Act[9] would also be unconstitutional under the Fifth Amendment. Of course, Respondent does not even suggest that these federal laws are unconstitutional.

Second, the Constitution contains no guarantee of survival of actions or recognition of the right of an executor to be substituted as plaintiff in an action instituted by a decedent. Absent constitutional mandate, the right of survival is a legislative function. Thus, by enacting Article 2315, the legislature created a right of action in favor of certain designated beneficiaries where none existed before.[10] "[T]he Equal Protection Clause does not require that a state must choose between attacking every aspect of a problem or not attacking the problem at all. (citations omitted) It is enough that the State's action be rationally based and free from invidious

9. See Addendum 1, Pet. Br. at 30.

10. Article 2294 of the Civil Code of 1825, the corresponding article to the present Article 2315, contained no provision for survival of tort actions after the death of the injured person, so an action for damages for personal injuries abated on his death. *Hubgh vs N.O. & C.R.R. Co.*, 6 La. Ann. 495 (1851).

discrimination."[11]

Third, "the objective of [Article 2315] clearly is to establish degrees of entitlement of various classes of persons in accordance with their varying degrees and kinds of relationship to the [deceased]. Regardless of their sex, persons within any one of the enumerated classes of that section are similarly situated with respect to that objective."[12]

The classification of beneficiaries in Article 2315 makes a rational distinction in favor of those family members for whom the death of the injured party imposes a disproportionate burden in terms of economic and emotional hardship.[13] Under such circumstances, the courts cannot "substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws".[14]

Finally, in providing for transmission of a right vested in the victim to certain designated beneficiaries, Article 2315 is similar to Louisiana's statutory scheme for distribution of property in intestate successions. In both cases, "the power

11. *Dandridge vs Williams*, 397 US 471, 486-487 (1970). To constitute an "invidious discrimination" there must be "a classification which is arbitrary, irrational and not reasonably related to a legitimate purpose". *United States ex rel. Buonoraba vs Commissioner of Correction*, 316 F.Supp. 556, 564 (SD N.Y. - 1970).

12. Paraphrasing this Court in *Reed vs Reed*, 404 US 75, 77 (1971), recognizing the validity of that part of an Idaho statute, while striking down the following section for discrimination because of sex.

13. *Cf. Kahn vs Shevin*, 416 US 351, 355 (1974), in which this Court held that a Florida tax statute which discriminated in favor of widows was not violative of the Equal Protection Clause because it was "reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden".

14. *Ferguson vs Skrupa*, 372 US 726, 730 (1963). See *Kahn vs Shevin, supra*, 416 US at 356, fn. 10.

to make rules . . .to regulate the disposition of property left in Louisiana by a man dying there is committed by the Constitution of the United States and the people of Louisiana to the legislature of that State".[15]

Louisiana clearly has "the power to make laws for distribution of property left within the state", and "there is nothing in the vague generalities of the Equal Protection . . . Clause which empowers this Court to nullify the deliberate choices of the elected representatives of the people of Louisiana".[16]

II - REPLY TO *AMICUS CURIAE'S* BRIEF

A - *BY DIRECTING IN §1988 THE ADOPTION OF THE STATE LAW AS FEDERAL LAW, CONGRESS HAS REJECTED - NOT SANCTIONED - JUDICIAL CREATION OF A FEDERAL COMMON LAW OF SURVIVORSHIP*

There is nothing explicit in §1988 giving the federal courts sanction to create federal common law, as asserted by Amicus in its brief (p. 2), nor is there any such implicit sanction in the statute.

Amicus is in error in stating that Petitioner concedes that the federal courts have the power under §1988 to look beyond Louisiana law on survival of actions so as to fulfill the purposes of the Civil Rights Acts (Am. Br. at 10, fn. 10). To the contrary, our position is that §1988 directs that the

15. *Labine vs Vincent*, 401 US 532, 538 (1971).

16. *Ibid.*, pp. 539-540. See also fn. 20, *infra*, Concurring Opinion of Mr. Justice Brennan, *The Tungas vs Skovgaard*, 358 US 588, 609 (1958).

federal courts shall apply and follow the state law if not inconsistent with the "laws of the United States". Petitioner does not concede the correctness of *Sullivan*, but shares more closely the view of Mr. Justices Harlan and White and the Chief Justice with respect to §1988 as set out in their dissent when they stated that "the majority turns this provision on its head by suggesting (1) that §1988 creates a federal remedy, apart from state law, when the remedial provisions of a civil rights statute, like §1982, are 'deficient' . . . If §1988 says anything at all relevant for this case, it suggests that in those cases where it is appropriate to cure remedial deficiencies of a federal civil rights statute by implication, this is to be done by looking to state law to see what remedies, consistent with federal policies would be available there".[17]

Under that view, there is no such power to create federal common law to remedy any legislative deficiencies in the civil rights acts, and if the state law cannot be applied by reason of inconsistency with federal laws, then it is simply not appropriate judicially to cure the legislative defects. That is, and should be, the task of Congress within whose power such legislative responsibility falls - not the federal courts.

Nevertheless, Petitioner's further position is, as indicated in his main brief, that, in any event, the result of *Sullivan* in regards to allowance of damages can perhaps be justified by reason of the fact that there was extant a well-recognized federal rule of damages, as well as a state rule. In the present

17. *Sullivan vs Little Hunting Park*, 396 US 229, 256-257 (1969). It should also be observed that the matter involved here is one of substantive remedy, not a procedural one such as the courts considered in *Lefton vs Hattiesburg*, 333 F2d 280 (CA 5-1964) and other cases cited by Amicus (p. 9, fn. 8).

case, however, there is no rule of survival of action whatever - federal or state - on which the court may rest its attempt to cure the legislative deficiency.

In *Bell vs Hood*, 327 US 678 (1946), on which this Court relied in *Sullivan*, 396 US at 238-239, this Court recognized that it was "any *available* remedy to make good the wrong done" which the "federal court may use" (emphasis supplied). There is no "available remedy" here, other than Louisiana's statute of limited survivorship.

Even should the federal courts still feel compelled to reject that state statute rather than applying it to this case under § 1988, then they must look to Congress to provide some other remedy which it had previously seen fit not otherwise to provide. It is submitted that for this Court not to do so, but now to create a federal common law of absolute survival of § 1983 actions, would be, in the words of this Court, a "bald . . . form of judicial innovation", as well as "drastic . . . judicial legislation". [18]

Amicus' discussion of the Rules of Decision Act, 28 USC § 1652 (Am. Br. at 17-23) is entirely inappropriate, since whatever may have been the course of action open to the federal courts absent § 1988, the fact remains that Congress in enacting § 1988 did act to fix the course of action to be pursued by the courts under the Civil Rights Acts, and the provisions of the state statute must control the disposition of this action, as the statute itself commands. It should be observed, however, that the Rules of Decision Act itself specifies that state laws shall be regarded as rules of decision in common law trials in federal courts "in cases where they

18. *UAW vs Hoosier Cardinal Corp.*, 383 US 696 (1966), at 701 and 703.

apply", so that when federal questions and the United States are involved, as was true in *United States vs Little Lake Misere Land Co.*, 412 US 580 (1973), that Act is not applicable so as to require following state law. That case is accordingly not in point with respect to the issues in the instant one.

This is not a case in which the principles of "choice of law" are applicable - one in which the federal courts, balancing the various factors to which reference is made in Amicus' brief (at 24-34), may or may not apply state law in fashioning a federal rule to govern the action. This is not a case of the type described by this Court in *Clearfield Trust Co. vs United States*, 318 US 363 (1943), in which, "(i)n our choice of the applicable federal rule we have occasionally selected state law". Nor is this case simply one in which such selection "is justified on the assumption 'that Congress has consented to application of state law' " [Am. Br. at 25, quoting *United States vs Standard Oil Co.*, 332 US 301, 309 (1947)].

To the contrary, in the present case Congress has expressly commanded in § 1988 that the federal courts apply the state law to govern the disposition of the case. As the courts in *Brazier, Spence vs Staras, Hall vs Wooten* and *Dean vs Shirer* have all recognized (see Pet. Br. at 15-17), Congress in enacting § 1988, has adopted the state law of the forum as the federal law, or "federal common law", of survivorship of civil rights actions.

Similarly, the basic distinction between those maritime cases involving the application of federal standards rather than state survival laws, and this terrene case, is that the rule in the former is that the federal courts *may* resort to state legislation but should apply uniform federal standards of

relief, whereas in the present case under the Civil Rights Act, Congress expressly provided in § 1988 that the courts *shall* look to the state law of the forum and apply it to the case. In Admiralty, it has long been recognized that the maritime law is a creature of the federal courts, and the observations of Mr. Justice Brennan in his concurring opinion in *The Tungas*, 358 US 588, 597 *et seq.* (1958),[19] and of this Court in *Moragne vs States Marine Lines*, 398 US 375 (1970), are accordingly at least understandable in that context.[20]

However, such maritime cases should not be deemed by the Court to be either binding or persuasive with respect to any situation in which Congress has spoken as to survivorship of an action or as to applicability of the state law in determining any federal question, be it survivorship or otherwise. Thus, in maritime actions for death on the high seas as to which Congress has enacted DOHSA, as distinguished from those actions occurring in state waters,[21] or in actions under the Outer Continental Shelf Lands Act or under §1983 of the

19. Amicus relied on *The Tungas* in its brief (p. 42) in *Jones vs Hildebrant*, 432 US 183 (1977), in which Amicus had appeared as one of the *amici curiae*.

20. Even in Mr. Justice Brennan's concurring opinion in *The Tungas*, however, he fully recognized that "the distribution of funds accruing to a decedent's representatives by reason of his death is a matter, in our federal system, particularly within the competence of the States. Certainly it is not a matter more destructive of the uniform character of the maritime law than were the state statutes of limitations enforced in *Western Fuel Co. vs. Garcia, supra*. And it is no more disturbing to the maritime law whether the state distributional scheme is one provided generally by its law or one peculiar to its Wrongful Death Statute." Thus, it would seem surely to follow that Louisiana's "distributional scheme" under Article 2315 should be readily adopted by the federal courts under §1988 of the Civil Rights Act.

21. See *Mobil Oil Corp. vs Higginbotham*, No. 76-1726, argued before this Court on January 10-11, 1978.

Civil Rights Act in each of which latter acts Congress has expressly directed the federal courts to look to and apply the state law of the forum, the will of Congress - and not of the judiciary - should prevail.

If the federal courts should feel that the result of application of the State law is not the result which it would like, or that the public or federal interest would be better served by a different result, that is still a matter for the legislative branch, not the judiciary. Let the federal courts strongly commend to Congress enactment of an amendment to DOHSA, to the Outer Continental Shelf Lands Act, or to §1988 of the Civil Rights Act to provide such result if, in its legislative wisdom, that is the one to better serve the people of the United States.

B - ANY DETERRENCE OBJECTIVE OF THE CIVIL RIGHTS ACT DOES NOT WARRANT REJECTION OF LOUISIANA'S SURVIVORSHIP STATUTE

The contention of Amicus that the federal courts should reject the applicable state law of survivorship in this case is bottomed on the proposition that the purpose of the Civil Rights Acts, and in particular the Ku Klux Act of 1871, is not only compensatory, but is also to serve as a deterrent.

While the deterrent effect of this suit may be seen while Shaw was alive, that objective at least pales with his death. The needed effect of deterrence should occur prior to death of the victim and, in any event, there will be few cases indeed in which there will be no qualified survivor.[22]

22. In addition, the FELA, Jones Act, LHWCA and DOHSA, certainly all in theory involve policies of deterrence as well as compensation.

If Congress did not see fit to provide for full, absolute survivorship of actions resulting from those acts of invidious discrimination which are the subject of § 1985, it is impossible for Petitioner to comprehend how such absolute survivorship could ever have been envisioned - much less dictated, as Amicus now espouses - by Congress in enacting §1983.

The enactment by the Reconstruction Congress of §1986 [23] in and of itself negates Amicus' assertion that "there is no adequate reason to permit the vindication of constitutional rights, and the deterrence of unconstitutional conduct, to be impeded because of the death of one who claimed denial of his rights" and that "such a result is wholly inconsistent with the purposes of the federal Civil Rights Acts" (Am. Br. at 36).

That the asserted deterrence objective of Congress in enacting the Ku Klux Act of 1871 is not such an overriding factor as to justify the federal courts' refusal to apply a state statute of survivorship in favor of certain designated beneficiaries with respect to an action under § 1983, is amply demonstrated by the action of Congress itself in enacting the exact same form of limited survivorship provision in §1986 which similarly restricts the survival of actions under §1985 of the Act. If Congress had intended the result now championed by Amicus, it seems obvious that Congress would certainly have required the same result as to actions under § 1985 which is the part of the Ku Klux Act aimed specifically at the concerted actions of the white-robed and hooded, night-riding Klan which burned, ravaged, murdered and oth-

23. The pertinent portion of that section provides: ". . .if the death of any party be caused by any such wrongful act and neglect, the legal representative of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased."

erwise terrorized the Blacks of Reconstruction Days.

Amicus further argues that any limitation whatever in the states' survival statutes, must be rejected because they "are inconsistent with the 'complete justice' theme of the Reconstruction statutes" (Am. Br. at 36). Again, it is incomprehensible to Petitioner that Congress could have intended that any "complete justice theme" of its 1871 Act should prevent this Court from applying to this action under §1983, Louisiana's survivorship statute which is restricted only as to designated familial beneficiaries, while Congress itself was enacting at the same time, §1986 which not only similarly restricts survivorship to certain designated familial beneficiaries, but also restricts their recovery to a maximum total of $5,000.

This should also serve to bring down the curtain on the "soap opera" hypothetical situation authored and produced by Amicus (Br. at 37-38), for if the hypothetical severe beating which resulted in death had been perpetrated by defendants as part of any "invidious discrimination" proscribed by § 1985, the hospital and doctors for whom Amicus shows so much concern, would certainly "have no way of being paid for their services", and decedent's orphaned nephew for whom Amicus has so much compassion, would have to be content with a maximum possible gross recovery of $5,000 with which to pursue his college education, in light of the restrictive survival provisions of §1986 of the Act.

Amicus glosses over the fact that - after all of the speeches, veto message, and debates in 1866 and 1871, discussed at some length in Amicus' brief (at 10-15 and 30-31) - the Reconstruction Congress of 1871 nevertheless chose to limit specifically to the widow or next of kin (not to the estate

or a residuary legatee) survival of an action brought by one who eventually died from a beating administered by the Ku Klux Klan. Additionally, Congress limited the amount of that recovery to the relatively minor sum of $5,000.[24]

Finally, it is not accurate to say that, unlike the unlawful constitutional conduct proscribed by the Civil Rights Act, "the loss-shifting rationale of tort and maritime law is designed" to operate with respect to activity which is itself legal. In both tort and maritime law, liability flows as well from illegal activities, such as hit-and-run, DWI, violations of OSHA, violations of Coast Guard regulations, etc.

It should be recognized that under the Civil Law doctrine of Louisiana, Article 2315 is directed at both offenses ("délits") and quasi-offenses ("quasi-délits"), that is, intentional and illegal wrongs, as well as negligent ones (La. Civil Code, Title V).

In sum, deterrence is simply a false issue with respect to applicability of Louisiana law under §1988. It is absolutely absurd to contend that anyone would consider, before violating §1983, the outside possibility that his "victim" might die of natural causes during the pendency of a §1983 action, much less that a public official intent on committing an act violative of §1983 would first stop to investigate whether or not his intended victim had any spouse, children, parents,

24. Amicus' only reference to this point appears in note 35 of its brief, stating: "It would be more than the process of implication can bear to view §1986 as even an indication that survival of Civil Rights actions is inconsistent with Congressional intent." Amicus clearly misses the point. Section 1986 is a patent grant of *limited* survival for a very serious violation of civil rights. Because of its $5,000 limitation, §1986 is even more restrictive than Article 2315 of Louisiana's Civil Code which is to be applied, by virtue of §1988, to the §1983 action at bar.

sister or brother. It is even more absurd to believe that any such public official on the threshold of committing an act violative of §1983 would be encouraged "not to stop after they had injured but to be certain to kill" (Am. Br. at 37, quoting *Davis vs Johnson*, 138 F.Supp. at 574) by a holding of this Court that Louisiana's statute must be applied under §1988.

III - CONCLUSION

In 1976, Congress amended §1988 to add attorneys' fees for violation of, *inter alia*, the Reconstruction Era Civil Rights Acts.[25] It is significant that in considering §1988 at that time Congress still chose not to reject or modify, in any manner, the specific language of §1988 incorporating the law of the forum state.[26] As stated in the Senate Report accompanying the amendment, "The purpose of this amendment is to remedy anomalous gaps in our civil rights laws created by the United States Supreme Court's recent decision in *Alyeska Pipeline Service Co. vs Wilderness Society*, 421 U.S. 240 (1975)".[27]

The report goes on to observe that, before the *Alyeska* decision, "[m]any lower Federal courts throughout the Nation . . . were exercising their traditional equity powers

25. Pub. L. 94-559, §2, October 19, 1976, 90 Stat. 2641.

26. The amended §1988 is identical to that enacted by the Reconstruction Congress except for the addition of a sentence providing for attorneys' fees. The Senate Report (Judiciary Committee), No. 94-1011, June 29, 1976 [to accompany S.2278], 1976 U.S. Code Cong. and Adm. News 5908-5914, states, at 5913: "This bill creates no startling new remedy . . . It does not change the statutory provision regarding the protection of civil rights except as it provides the fee awards."

27. *Ibid.*, 1976 U.S. Code Cong. and Adm. News at 5909.

to award attorneys' fees under early civil rights laws . . . However, in *Alyeska*, the United States Supreme Court, while referring to the desirability of fees in a variety of circumstances, ruled that only Congress, and not the courts, could specify which laws were important enough to merit fee shifting under the 'private attorney general' theory. The Court expressed the view, in dictum, that the Reconstruction Acts did not contain the necessary congressional authorization." [28]

The Civil Rights Act is admittedly entirely silent on survival of §1983 actions. § 1988 of that act clearly provides that this gap "shall" be filled by the law of the forum state. Respondent, Amicus, the district court, and the Fifth Circuit have all been unable to cite any laws of the United States with which Article 2315 of the Civil Code can be said to be inconsistent. This Court should apply § 1988 which, though it was reconsidered by Congress only sixteen months ago, still clearly provides for the application of "statutes of the State wherein the Court having jurisdiction of such civil or criminal cause is held".

Even if this Court should possibly find that absolute survival of §1983 actions is a desirable policy, "we need labor the matter no further. It appears to us that the rule suggested [by Respondent and Amicus] here, and adopted by the Court of Appeals, would make major inroads on a policy matter that Congress has reserved for itself". [29] Arguments concerning the policy issue involved in the instant case as to

28. *Id.* at 5911.

29. *Alyeska Pipeline Service Co. vs Wilderness Society*, 421 US 240, 269 (1975).

absolute survivorship of civil rights actions under §1983, "are properly addressed to Congress". [30]

For all of the foregoing reasons, it is again respectfully submitted that the judgment below should be reversed and this action dismissed.

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30. *F. D. Rich Co., Inc. vs United States ex rel. Industrial Lumber Co.*, 417 US 116, 131 (1974).

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EDWARD F. WEGMANN, Executor for Clay L. Shaw, et al.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-178

WILLARD E. ROBERTSON,
Petitioner,

v.

EDWARD F. WEGMANN, Executor for Clay L. Shaw, et al.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Lawyers' Committee for Civil Rights Under Law, proposed *amicus curiae* herein, respectfully seeks leave of this Court to file the attached brief in order to assist the Court in resolving an important issue of survival of actions brought under federal civil rights statutes. In the attached brief, *amicus* discusses the varied authority of federal courts to look beyond state law provisions in order to achieve the ends of federal policy in suits to enforce federal rights, in cases involving both civil rights and other subject matter. The instant case presents the sort of issue which arises frequently in civil rights litigation, including particularly actions for damages suffered by reason of police or other official misconduct, and this Court's ruling on the survival question presented here will have an important bearing on the disposition of such actions. *Amicus* does not believe that the generic nature of the questions presented in this case will be adequately

addressed by the parties, because in the papers filed with the Court to date, they have discussed only the narrow problem created by Clay Shaw's death, and because neither party is represented by counsel who frequently litigate civil rights actions, to the best of *amicus'* knowledge.

The interest of *amicus* in this case grows out of its longstanding concern with the problem of devising remedies that will secure the effective enforcement of federal civil rights laws, and is more fully described *infra* pp. 1-3.

Amicus has sought consent of the parties to the filing of this brief, without success.

WHEREFORE, the Lawyers' Committee for Civil Rights Under Law respectfully moves that its brief be filed in this case.

Respectfully submitted,

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WILLARD E. ROBERTSON,
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BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE*

INTEREST OF *AMICUS CURIAE*

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of the President of the United States to involve private attorneys throughout the country in the national effort to assure civil rights to all Americans. The Committee's membership today includes two former Attorneys General, ten past Presidents of the American Bar Association, two former Solicitors General, a number of law school deans, and many of the nation's leading lawyers. Through its national office in Washington, D.C., and its offices in Jackson, Mississippi, and eight other cities, the Lawyers' Committee over the past fourteen years has enlisted the services of over a thousand members of the private bar in addressing the legal problems of minorities and the poor in voting, education, employment, housing, municipal services, the administration of justice, and law enforcement.

The Lawyers' Committee has been actively involved in a wide variety of litigation on behalf of minority-race persons seeking redress for unconstitutional conduct committed under color of state law; the vast preponderance of this litigation has been brought in federal courts pursuant to the provisions of 42 U.S.C. § 1983.[1] The Committee's experience is that broad principles of relief are essential to the fulfillment of that statute's goals: principally, the compensation of the victims of unconstitutional action and the deterrence of like misconduct in the future.

Because the federal Civil Rights Acts do not furnish standards for the disposition of every matter arising in the course of the litigation which they authorize, historically the federal courts have engaged in interstitial lawmaking through incorporation of state law or creation of federal common law. This practice is given explicit statutory sanction by 42 U.S.C. § 1988.

The flexibility which § 1988 affords federal trial courts to shape their procedures and remedies in accord with the underlying policy of the Civil Rights Acts is indispensable to effective redress for constitutional wrongs. *Amicus* is therefore concerned by the Petitioner's suggestions that § 1988 should be given a cramped interpretation, restricting federal courts to state law alone on matters of procedure and remedy arising in civil rights suits.

Of particular importance to *amicus* is the availability of an effective federal remedy for police misconduct and brutality. This interest led the Lawyers' Committee (along with other *amici*) last Term to file a brief in

[1] The Committee has also filed amicus briefs with this Court in a number of § 1983 cases, including *Huttto* v. *Finney*, No. 76-1660 (pending); *Monell* v. *Department of Social Services*, No. 75-1914 (pending); *Jones* v. *Hildebrant*, 432 U.S. 183 (1977); *Rizzo* v. *Goode*, 423 U.S. 362 (1976); and *Warth* v. *Seldin*, 422 U.S. 490 (1975).

Jones v. *Hildebrant*, 432 U.S. 183 (1977). There, the mother of a youth shot and killed by a Denver policeman sought to recover damages for his death in a state court action based, alternatively, upon 42 U.S.C. § 1983. The Colorado Supreme Court held that the state's "wrongful death" statute would be "borrowed" in a suit on the federal claim, but that as a result, any damage recovery would be limited by Colorado's "net pecuniary loss" rule applied in state wrongful death suits. We argued that the state's limitation on damages was ill-suited to afford complete justice as § 1983 required, and therefore it should not be incorporated in any "borrowing" of the state's wrongful death statute under 42 U.S.C. § 1988. Alternatively, we urged this Court to sustain a federal common law of wrongful death in civil rights actions as it had done in admiralty, in *Moragne* v. *States Marine Lines*, 398 U.S. 375 (1970).[2]

The instant case involves a state "survival" statute, which can also play a major role in lawsuits to recover damages for police misconduct which maims or causes death. Acceptance of the argument which Petitioner advances would have consequences extending far beyond the facts of this case, which we discuss below. We file in this matter, therefore, to emphasize the critical importance of sustaining the federal courts' *authority* to reject state law, when to apply it would undermine substantial federal concerns—whatever the merits of any particular exercise of that authority. We are also satisfied that the rejection of Louisiana's survival statute in this case was proper.

[2] After oral argument, this Court dismissed the writ of certiorari as improvidently granted, as it had become clear that the Petitioner in *Jones* was not seeking damages for the injury to and killing of her son, but rather damages for deprivation of her claimed parental interest in the life of her son. 432 U.S. at 189.

STATEMENT

The facts relevant to the issues presented to this Court are few, and are not in any dispute. In March of 1967, the original plaintiff in this action Clay Shaw was indicted by an Orleans Parish, Louisiana grand jury on a charge of conspiracy to murder President John F. Kennedy. The indictment followed Shaw's arrest and the public announcement of the charge by then Parish District Attorney Jim Garrison, one of the defendants in this action, and a preliminary hearing in state court. *Shaw* v. *Garrison*, 293 F.Supp. 937, 939 (E.D. La.), *aff'd* 393 U.S. 220 (1968); *id.*, 328 F. Supp. 390, 394 (E.D. La. 1971). In 1968 Shaw sued Garrison before a three-judge federal district court, seeking declaratory and injunctive relief to restrain his further prosecution on the conspiracy charge. The Court granted Garrison's motion for summary judgment, holding that no grounds for federal court interference with the pending state prosecution had been alleged. *Shaw* v. *Garrison*, 293 F. Supp. 937 (E.D. La.), *aff'd* 393 U.S. 220 (1968).[3]

On March 1, 1969, a state court jury unanimously found Shaw not guilty of the conspiracy charge. *Shaw* v. *Garrison*, *supra*, 328 F. Supp. at 399. The following day, Garrison filed an information charging Shaw with perjury. *Id.* at 399-400. Before that charge could be tried, in 1971 Shaw sought and obtained a federal court injunction against his further prosecution, based on an explicit finding of bad faith by Garrison sufficient to bring the case within the exceptional circumstances rule of *Younger* v. *Harris*, 401 U.S. 37 (1971). *Shaw* v. *Garrison*, 328 F. Supp. 390 (E.D. La. 1971), *aff'd* 467 F.2d 113 (5th Cir.), *cert. denied*, 409 U.S. 1024 (1972).

[3] The district court's opinion declining to entertain the 1968 action correctly anticipated much of this Court's reasoning in *Younger* v. *Harris*, 401 U.S. 37 (1971) and *Samuels* v. *Mackell*, 401 U.S. 66 (1971).

In the meantime, Shaw had in February 1970 filed this civil rights damages action against Garrison and other co-defendants (including Petitioner Robertson) with whom Garrison was alleged to have conspired to harass Shaw and deprive him of his constitutional rights. *Shaw* v. *Garrison*, 391 F. Supp. 1353, 1355 (E.D. La. 1975), *aff'd* 545 F.2d 980 (5th Cir. 1977), *cert. granted*, 46 U.S.L.W. 3373 (December 5, 1977). Before the action was tried, Shaw died on August 15, 1974, "survived by neither spouse, children, parents, nor siblings." *Id.*, 391 F. Supp. at 1356. Several of the defendants, including Petitioner, thereupon moved to dismiss the action on the ground that under Louisiana law it abated with Shaw's death. Shaw's executor sought to be substituted as plaintiff.[4] After receiving briefs, the trial court agreed that the action would abate under Louisiana law, but held that 42 U.S.C. § 1988 authorized "the creation of a federal common law of survival in civil rights actions in favor of the personal representative of the deceased" in order to give effect to "the policies underlying the civil rights laws and [this] Court's treatment of survival of actions in analogous contexts." *Id.*, 391 F. Supp. at 1368. The Fifth Circuit agreed, and its judgment affirming the trial court's denial of the motions to dismiss is the subject of this Court's present review.

SUMMARY OF ARGUMENT

I

A. Where necessary to give effect to the congressional purpose underlying the Reconstruction Civil Rights Acts, 42 U.S.C. § 1988 authorizes federal courts in civil rights actions to look beyond the provisions of state laws governing matters of remedy and procedure. The plain

[4] Shaw left a valid will naming a friend as residuary legatee of his estate. Petition for Certiorari, at 4.

language of the statute, the debates of the 39th Congress which enacted it, and the very justification for affording a *federal* remedy for deprivations of constitutional rights, all support this power for the federal courts.

B. Even in circumstances where state law is generally held to govern, this Court has consistently interpreted the Rules of Decision Act (Section 34 of the first Judiciary Act) and Section 1988 to allow the federal courts to look beyond state law provisions when their application would produce results inconsistent with the purposes of federal law.

II

The lower court's exercise of the authority in this case is fully proper. Under either § 1988 or the inherent choice-of-laws responsibility of federal courts, there is no *per se* incorporation of state law. Rather, its applicability depends upon its appropriateness to give effect to the underlying federal policies. Here, the deliberate action of the Reconstruction Congresses creating a federal court cause of action in order to deter deprivations of constitutional rights by those acting under color of state law requires that Louisiana's limitation on survival of state-created claims be displaced.

ARGUMENT

Introduction

This case presents a relatively narrow issue: whether the courts below correctly exercised their authority under 42 U.S.C. § 1988 by holding, as a matter of interstitial federal common law, that this damage action under the Ku Klux Act of 1871[5] survived after the plaintiff's

[5] The relevant portion of the Act is now codified at 42 U.S.C. § 1983.

death, in favor of his residuary legatee or executor. However, the arguments made in Petitioner's brief implicate broader questions of federal judicial power under the Reconstruction era civil rights statutes.[6] It would be inappropriate to consider these questions solely in the factual context presented by the matter before the Court; yet Petitioner's analysis neither reserves nor fully treats them. In the discussion which follows, we accordingly show first, that federal courts are authorized, in civil rights cases brought pursuant to 42 U.S.C. §§ 1981-86, to look beyond the law of the state in which the trial court sits to discover applicable rules of law governing procedural and remedial questions not explicitly addressed by these Reconstruction era statutes; and second, that such authority was correctly exercised in the case and on the issue presently before the Court. Even if the Court were to disagree with our second point, therefore, it should not announce any general limitation on the power of federal trial judges to effectuate federal policy, in appropriate cases, by selecting non-state procedural or remedial legal doctrines which best fulfill the federal purpose which gives rise to the cause of action. *Cf. Sullivan* v. *Little Hunting Park*, 396 U.S. 229 (1969).

[6] These questions recur frequently in federal civil rights litigation but generally have not troubled the lower federal courts. Yet they are central to the effectiveness of the federal remedy for constitutional deprivations which is established by the Reconstruction era civil rights statutes. *See generally Mitchum* v. *Foster*, 408 U.S. 225 (1972).

I

Federal Courts Are Not Bound To Apply Only State Law To The Innumerable Procedural And Remedial Questions Which Arise In The Course Of Litigation But Which Are Not Specifically Addressed By Federal Statute.

A. *In civil rights actions, 42 U.S.C. § 1988 is an explicit congressional authorization to employ that combination of federal and state statutory and "common law" which best serves to fulfill the remedial and deterrent purposes of federal civil rights statutes.*

As this Court has noted, federal civil rights statutes—particularly those dating from the Reconstruction era—lack all of the specific provisions necessary to delimit precisely the contours of the remedial causes of action which they have been held to create.

> [I]nevitably existing federal law will not cover every issue that may arise in the context of a federal civil rights action.

Moor v. *County of Alameda*, 411 U.S. 693, 702 (1973).[7] As a result, in such suits the courts themselves must

[7] *See Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 414 n.14 (1968) (noting silence of 42 U.S.C. § 1982 with respect to recovery of damages); *Sullivan* v. *Little Hunting Park*, 396 U.S. 229, 238-40 (1969) (creating damage remedy under § 1982 to provide "an effective equitable remedy"); *Mitchum* v. *Foster*, 407 U.S. 225 (1972) (holding that 42 U.S.C. § 1983 is "expressly authorized" exception to 28 U.S.C. § 2283 despite absence of specific statutory language on point); *cf. Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 413-21 (1975) (holding that plaintiffs in cases under Title VII of the 1964 Civil Rights Act who prove employment discrimination should ordinarily receive back pay, although statute merely authorizes such remedy); *Northcross* v. *Board of Educ.*, 412 U.S. 427 (1973) (successful plaintiff in action to desegregate schools should "ordinarily" recover attorneys' fees under provision of Emergency School Aid Act of 1972 authorizing award in discretion of court); *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400 (1968) (same; Title II of Civil Rights Act of 1964).

provide answers to various procedural and remedial questions as they arise. In so doing, the courts are guided by the national policy expressed in the federal civil rights laws, which are to be "accord[ed] a sweep as broad as [their] language." *Griffin* v. *Breckenridge*, 403 U.S. 88, 97 (1971), quoting from *United States* v. *Price*, 383 U.S. 787, 801 (1966). Federal courts are quick to adjust their procedures to the task.[8]

42 U.S.C. § 1988 (originally Section 3 of the Civil Rights Act of 1866, 14 Stat. 27) requires no less.[9] It instructs that in civil rights matters, whenever federal statutes are "deficient in the provisions necessary to furnish suitable remedies," the courts shall apply the "common law" as modified by statutes of the forum state if it is not "inconsistent with the Constitution and laws of the

[8] *E.g.*, *Sanders* v. *Russell*, 401 F.2d 241 (5th Cir. 1968) (admission of out-of-state attorneys); *Brown* v. *City of Meridian*, 356 F.2d 602 (5th Cir. 1966) (acceptance of joint removal petitions); *Lefton* v. *City of Hattiesburg*, 333 F.2d 380 (5th Cir. 1964) (same); *United States* v. *Mayton*, 335 F.2d 153 (5th Cir. 1964) (registration of voters).

[9] 42 U.S.C. § 1988 provided as follows prior to its 1976 amendment by the Civil Rights Attorney's Fees Awards Act, P.L. 94-559 (October 19, 1976), 90 Stat. 2641, in respects not here relevant:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

United States." § 1988 has been construed by this Court to permit resort to either federal *or* state rules on damages, "whichever better serves the policies expressed in the federal statutes," *Sullivan* v. *Little Hunting Park*, *supra*, 396 U.S. at 240. Thus, the plain language of the statute and its construction by this Court support the power questioned in this case, to look beyond Louisiana law on survival of actions so as to fulfill the purposes of the civil rights acts.[10]

There is nothing startling about this proposition when § 3 of the 1866 Act [11] is considered in the context of the practices of many state courts at the time of its passage. The debates in the 39th Congress contain repeated references—by both supporters and opponents of the bill—to state statutes limiting or abrogating the testimonial capacity of Black witnesses, or denying Blacks the right to bring suit. *See* CONG. GLOBE, 39th Cong., 1st Sess. 478-79, 602, 1121-22, 1151-52, 1156-57, 1159, 1260, 1265, 1270, 1293, 1759, 1777, 1783, 1809, 1832-33, Appendix

[10] Petitioner apparently concedes the point; the only distinction of *Sullivan* urged in his brief is that in *Sullivan* there was an extant "federal rule" to choose, while Petitioner contends there was no "federal rule" applicable to this case until one was created by the courts below. Pet. Br. at 18-19.

[11] § 1 of the 1866 Act, declaring the rights of citizens, is now codified at 42 U.S.C. §§ 1981, 1982. § 2 of the Act made it a criminal offense to deprive persons of those rights under color of state law, and is currently codified at 18 U.S.C. § 242. § 3 of the Act, in its original version, provided for federal jurisdiction "exclusively of the courts of the several states" as to criminal cases brought pursuant to § 2, and also provided for removal of cases from state to federal court in specified circumstances; it then contained the language now codified at 42 U.S.C. § 1988 and quoted in note 9 *supra*.

The entire 1866 Act was re-enacted, following passage of the Fourteenth Amendment, by § 18 of the Enforcement Act of May 31, 1870, 16 Stat. 140. In 1874 the revisers (*see generally Runyon* v. *McCrary*, 427 U.S. 160, 168 n.8 (1976)) made § 1988 applicable to all civil rights legislation. REV. STAT. § 722.

pp. 157-58, 182 (1866). This Act was clearly understood to invalidate such laws and to authorize criminal prosecution of state judges and other officials who sought to enforce them:

> I will not therefore attempt a full discussion of [the Act] now, but content myself with briefly presenting some of the grounds upon which I will again perform the proudest act of my political life in voting to make this bill the law of the land.
>
> It is scarcely less to the people of this country than Magna Charta was to the people of England.
>
> It declares who are citizens.
>
> It does not affect any political right, as that of suffrage, the right to sit on juries, hold office, &c. This it leaves to the States, to be determined by each for itself. It does not confer any civil right, but so far as there is any power in the States to limit, enlarge, or declare civil rights, all these are left to the States. But it does provide that as to certain enumerated civil rights every citizen "shall have the same right in every State and Territory." That is whatever of certain civil rights may be enjoyed by any shall be shared by all citizens in each State, and in the Territories, and these are:
>
> 1. To make and enforce contracts.
>
> 2. To sue, to be sued, and to be parties.
>
> 3. To give evidence.
>
> 4. To inherit, purchase, lease, sell, hold, and convey real and personal property.
>
> 5. To be entitled to full and equal benefit of all laws and proceedings for the security of person and property.

Id. at 1832 (Rep. Lawrence).

In these circumstances, it would be little short of astounding if Congress were to have intended by § 3 of the Act to require that the federal courts adopt, and be bound by, the very discriminatory state practices which the legislation was intended to invalidate. Rather, the conditional phrase, "so far as the same is not inconsistent with the Constitution and laws of the United States," was designed to guard against this result. The language was purposefully inserted into § 3 of the Act to authorize the creation of such *federal* law as might be necessary to carry out the broad purposes of the statute, as this Court recognized in *Sullivan*.[12]

Petitioner apparently would reduce this language, and Congress' understanding of it, to a nullity, for his brief says:

> The referral to and adoption of state law under the second part of Section 3 was never the subject of any debate whatever, [footnote omitted] since obviously it was deemed to constitute a recognition of the law of the forum state as controlling. What a furor would have resulted if any member of Congress had even suggested that a federal court could refuse to apply the pertinent state law under Section 3, and instead formulate a federal common law of survivorship of actions under the Civil Rights Act!

Pet. Br. at 12-13. Not only is this interpretation of the statute inconsistent with the very thesis of the 1866 Civil Right Act, as demonstrated above, but it is also factually inaccurate. The "federal common law" aspects of § 3 may not have been the focus of debate, but they did not go unnoticed by opponents of the bill. When it

[12] It is precisely in this sense, we submit, that § 1988 "was designed to supplement but not supplant the Rules of Decision Act." *Baker* v. *F&F Inv.*, 420 F.2d 1191, 1196 (7th Cir.), *cert. denied*, 400 U.S. 821 (1970). Even under that statute, as we show *infra* pp. 17-22, federal courts are not bound to apply state law which is inconsistent with federal interests.

came before the House of Representatives, Representative Kerr attacked the provision bitterly:

> I might go on and in this manner illustrate the practical working of this extraordinary measure. But I have said enough to indicate the inherent viciousness of the bill. It takes a long and fearful step toward the complete obliteration of State authority and the reserved and original rights of the States. . . . Then the things attempted to be prohibited are in themselves so extraordinary and anomalous, so unlike anything ever attempted before by the Federal Government, that the authors of this bill feared, very properly too, that the system of laws heretofore administered in the Federal courts might fail to supply any precedent to guide the courts in the enforcement of the strange provisions of this bill, and not to be thwarted by this difficulty, they confer upon the courts the power of judicial legislation, the power to make such other laws as they may think necessary. Such is the practical effect of the last clause of the third section, which reads as follows:
>
> . . . [text of statute omitted]
>
> That is to say, the Federal courts may, in such cases, make such rules and apply such law as they please, and call it *common law*.

CONG. GLOBE, 39th Cong., 1st Sess. 1271 (1866) (emphasis in original). Indeed, this was one of the grounds upon which President Andrew Johnson vetoed the measure, although his action was subsequently overridden by the Congress.

> It is clear that in States which deny to persons whose rights are secured by the first section of the bill any one of those rights, all criminal and civil cases affecting them, will, by the provisions of the third section, come under the exclusive cognizance of the Federal tribunals. It follows that if, in any State which denies to a colored person any one of all those rights,

that person should commit a crime against the laws of the State, murder, arson, rape, or any other crime, all protection and punishment through the courts of the State are taken away, and he can only be tried and punished in the Federal courts. How is the criminal to be tried? If the offense is provided for and punished by Federal law, that law, and not the State law, is to govern.

It is only when the offense does not happen to be within the purview of the Federal law that the Federal courts are to try and punish him under any other law. Then resort is to be had to "the common law, as modified and changed" by State legislation, "so far as the same is not inconsistent with the Constitution and laws of the United States." So that over this vast domain of criminal jurisprudence, provided by each State for the protection of its own citizens, and for the punishment of all persons who violate its criminal laws, Federal law, wherever it can be made to apply, displaces State law.

Veto Message of President Andrew Johnson, printed in *id.* at 1680 (1866).

Notwithstanding these protestations, the 1866 Act became law, in part for the purposes of avoiding reliance on state courts to enforce federal rights. *See, e.g., id.* at 602 (Sen. Lane).

Unquestionably, as Petitioner observes, § 1988 directs federal courts in civil rights actions to examine state law provisions upon an initial determination that federal statutes, or rules promulgated pursuant to federal statute, do not address procedural or remedial issues arising in those actions. And where state law is adequate to vindicate fully the constitutional rights which are the subject of the litigation, § 1988 clearly authorizes its use. But this is not the limit of § 1988; nor does the fact that state survival statutes were found adequate in *Brazier* v. *Cherry*, 293 F.2d 401 (5th Cir. 1961); *Pritch-*

ard v. *Smith*, 289 F.2d 153 (8th Cir. 1961); *Hall* v. *Wooten*, 506 F.2d 564 (6th Cir. 1974); *Dean* v. *Shirer*, 547 F.2d 227 (4th Cir. 1976); and *Spence* v. *Staras*, 507 F.2d 554 (7th Cir. 1974) indicate any conflict between those decisions and the ruling below in this case, as Petitioner suggests. Petition for Certiorari, at 6-10; *see* Pet. Br. 16-17.[13] In numerous cases, federal courts have

[13] Petitioner has cited no case in which state survival laws were applied to defeat a federal civil rights action. The description in Pet. Br. 15 n.11 is simply in error. *Holmes* v. *Silver Cross Hosp. of Joliet*, 340 F. Supp. 125 (N.D. Ill. 1972) was a suit against a court-appointed conservator, a hospital, and doctors on its staff, alleging infringement of plaintiff's freedom of religion by administration of a blood transfusion without his consent. The court concluded that the survival of the action under Illinois law depended on whether the defendants were acting "under color of state law." 340 F. Supp. at 129. It dismissed the court-appointed conservator from the lawsuit on the ground that he shared in the Illinois courts' judicial immunity in a § 1983 lawsuit (*see Pierson* v. *Ray*, 386 U.S. 547 (1967)). 340 F. Supp. at 131. All other defendants were found to have acted under color of state law, and the court concluded that by applying Illinois survival statutes the action could be maintained by decedent's administrator. *Id.* at 134, 135-36.

In *Evain* v. *Conlisk*, 364 F. Supp. 1188 (N.D. Ill. 1973), *aff'd without opinion* 498 F.2d 1403 (7th Cir. 1974), the decedent's daughter brought a § 1983 action to recover damages for the alleged wrongful killing of her father by Chicago police officers. The court held that the complaint stated no cause of action on behalf of the plaintiff individually, for the same reasons given by this Court in dismissing the writ of certiorari last Term in *Jones* v. *Hildebrant, supra.* (The court did not hold, as Petitioner suggests, that there was such a claim but that it did not survive under Illinois law.) Further, the court recognized that Illinois' "wrongful death" statute permitted "survival" of an action on behalf of decedent's estate for damages. However, it held that plaintiff could not maintain the suit because the appropriate statute of limitations period had long passed before litigation was commenced. *Id.* at 1191. *See Ingram* v. *Steven Robert Corp.*, 547 F.2d 1260, 1262 (5th Cir. 1977) for an instructive comparison of policies applied under § 1988 with respect to statutes of limitation and survival or wrongful death statutes.

It is true that in *Holmes* and some of the cases cited in text, there is *dictum* to the effect that state law is controlling on questions of wrongful death and survival. However, in all of these cases,

exercised the power granted by § 1988 to utilize procedural and remedial rules other than those embodied in state law.

For example, in *Davis* v. *Johnson*, 138 F. Supp. 572, 575 (N.D. Ill. 1955), the court found in § 1988 a directive to extend "suitable remedies," and—relying in part on maritime precedents—construed § 1983 to permit an action by the administratrix of a decedent whose death resulted from the alleged constitutional violation. In *Basista* v. *Weir*, 340 F.2d 71, 86-87 (3d Cir. 1965), the court held that punitive damages could be awarded in a § 1983 action under federal common law principles, although unavailable in a state court action. Similarly, following this Court's ruling in *Sullivan*, *supra*, the court in *Lee* v. *Southern Home Sites Corp.*, 429 F.2d 290, 294 (5th Cir. 1970) held that punitive damages could be awarded in a § 1982 cause of action without examining state law on the question. *See also*, *Johnson* v. *Greer*, 477 F.2d 101, 106 (5th Cir. 1973) (referring to "the prevailing view [of tort law on proximate cause] in this country" to determine proper federal rule in § 1983 case); *Young* v. *ITT*, 438 F.2d 757, 760 (3d Cir. 1971) (damages available in § 1981 employment discrimination suit); *Ambrose* v. *Wheatley*, 321 F. Supp. 1220, 1221 n.1 (D. Del. 1971) (punitive damages); *United States ex rel. Washington* v. *Chester County Police Dep't*, 300 F. Supp.

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either state law was found adequate to permit federal civil rights actions to be pursued, or some other ground for dismissal was present. The courts have recognized that the breadth of interests protected by § 1983 extend beyond narrow state law tort and contract categories, and require generous interpretation of state survival statutes. *E.g.*, *Dean* v. *Shirer*, *supra*, 547 F.2d at 229-30. *Cf. Monroe* v. *Pape*, 365 U.S. 167, 196 (1961) (Harlan, J., concurring). In many cases, including those cited in the following paragraph in text, courts have freely ventured beyond state law to give effect to the underlying policies of the civil rights acts. There is little support in the lower court holdings for Petitioner's confined reading of § 1988.

1279, 1282 (E.D. Pa. 1969) (§ 1981 damage action for police brutality; alternative holding).

The sum of the existing jurisprudence is that § 1988 requires no slavish adherence to provisions of state law but permits its rejection, and the fashioning or application of interstitial federal common law, in order to provide complete justice under the Civil Rights Acts.

B. *The same flexibility characterizes the practice of the courts in all federal question litigation with respect to application of state law; this flexibility is entirely consistent with the Rules of Decision Act and inheres in the constitutional grant of jurisdiction.*

Even without § 1988, and its explicit conditional language, state law would serve as a reference point in federal question litigation on matters not controlled by federal rule or statute; however, its use would not be obligatory but would depend on the circumstances and the effect on federal interests. This relationship between state and federal law follows logically from the limited constitutional grant of jurisdiction to the Courts of the United States, the uniquely *federal* linkage of states and nation, and the function of state law as a source of rules governing primary conduct.

The Constitution provides for the judicial Power of the United States, extending, *inter alia*, to "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made . . . ." U.S. CONST., art. III, § 2, cl. 1. Inherent in this grant of judicial authority to the national government is the power to determine the principles of law applicable to cases upon which the judicial Power acts. Thus, in the absence of statute, federal courts would have been obliged to exercise the interpretive authority of a court of common law to determine questions arising in the course of federal case liti-

gation.[14] This power was limited by § 34 of the Judiciary Act of 1789, 1 Stat. 92 (the Rules of Decision Act), which provided that

> . . . the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.[15]

However, the Rules of Decision Act has never been interpreted to mandate unswerving application of state law to every matter not explicitly determined by federal statute or rule.[16]

In *Robinson* v. *Campbell*, 16 U.S. (3 Wheat.) 212 (1818), an ejectment action arising under an interstate compact, this Court held that the Rules of Decision Act had to be construed in accordance with other provisions of federal law. Since Congress had provided for federal court proceedings in equity in the first Judiciary Act, the Court refused to apply state law, inconsistent with

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[14] Similarly, in the absence of statute, the Courts of the United States would possess inherent judicial authority to regulate their own procedures. For example, although the Judiciary Act of 1789 did not grant explicit rulemaking authority to this Court (*compare* § 2, Act of May 8, 1792, 1 Stat. 275, 276, authorizing this Court to prescribe forms and modes of proceedings to district and circuit courts), in August of 1792 the Court announced that it "consider[ed] the practice of the courts of *King's Bench* and *Chancery* in *England*, as affording outlines for the practice of this court; and that [it] will, from time to time, make such alterations therein, as circumstances may render necessary." 2 U.S. (2 Dall.) 411-14 (1792).

[15] The Rules of Decision Act is now codified at 28 U.S.C. § 1652.

[16] In *Marbury* v. *Madison*, 5 U.S. (1 Cr.) 137, 162-63 (1803), Chief Justice Marshall relied upon Blackstone's COMMENTARIES to imply the existence of a judicial remedy from a United States statute considered to grant a legal right, but silent on the subject of remedy.

equity jurisdiction, pursuant to the Rules of Decision Act. *Id.* at 222-23 (alternative holding). Since then, in innumerable cases involving federal questions, this Court has determined that the substantive principles of federal law require, in exception to the Rules of Decision Act, the development and application of "interstitial" federal common law. *E.g.*, *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972); *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 338 (1971); *J.I. Case Co.* v. *Borak*, 377 U.S. 426 (1964); *Local 174* v. *Lucas Flour Co.*, 369 U.S. 95 (1962); *Farmers Educ. Coop. Union* v. *WDAY*, 360 U.S. 525 (1959); *McAllister* v. *Magnolia Petroleum Co.*, 357 U.S. 221 (1958); *Textile Workers Union* v. *Lincoln Mills*, 363 U.S. 448 (1957); *National Metropolitan Bank* v. *United States*, 323 U.S. 454 (1945); *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U.S. 210 (1944); *Clearfield Trust Co.* v. *United States*, 318 U.S. 363 (1943); *Sola Elec. Co.* v. *Jefferson Elec. Co.*, 317 U.S. 173 (1942); *Jackson County* v. *United States*, 308 U.S. 343 (1939); *see generally Monaghan, The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975).

The standards of § 1988 as well as the Rules of Decision Act were perceptively summarized in this language from a § 1983 decision:

> . . . our Court of Appeals has concluded that § 1988 was designed to supplement but not supplant the Rules of Decision Act and is applicable only when federal substantive law is not suitably adapted or sufficient to provide an appropriate remedy and the states have *remedial* provisions of law which, if applied, will help achieve the goals desired by the Civil Rights Act. Baker v. F&F Investment Company, 420 F.2d 1191, 1193-1197 (7th Cir. 1970), cert. denied, Universal Builders, Inc. v. Clark, 400 U.S. 821, 91 S. Ct. 40, 27 L. Ed. 2d 49 (1970). After reviewing the legislative history behind the Rules of Decision

> Act and § 1988, the Court there concluded that the Rules of Decision Act requires the application of state law in federal question suits where Congress has not specifically legislated on the particular aspect of law covered by the state law and where no uniform federal common law is felt by the courts to be required, and if application of the state law does not deny or conflict with the very right to relief created by the federal law.

Luker v. *Nelson*, 341 F. Supp. 113, 116 (N.D. Ill. 1972) (emphasis in original). Thus, it is the nature of federal interests affected in any instance which determines the extent to which state law shall apply, not any mechanical application of the Rules of Decision Act. *Compare United States* v. *Yazell*, 382 U.S. 341 (1966) (Texas law of coverture applies to Small Business Administration loan agreements) *with United States* v. *Carson*, 372 F.2d 429 (6th Cir. 1967) (Tennessee limitation on damages would not be applied to government suit for conversion of property secured by mortgage executed in connection with Bankhead-Jones Farm Tenant Act loan).

Just a few Terms ago, this Court reemphasized the choice-of-law authority allowed courts in federal question litigation [17] by the Rules of Decision Act. In *United States* v. *Little Lake Misere Land Co.*, 412 U.S. 580 (1973), the government brought an action to quiet title to parcels of land in Louisiana. The issue decided by this Court was whether Louisiana law applied to determine the validity or extinguishment of prior reservations of mineral rights in the act of sale and judgment of condemnation by which

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[17] Existence of the same authority under the Rules of Decision Act in diversity cases has been suggested. *See Atkins* v. *Schmutz Mfg. Co.*, 435 F.2d 527 (4th Cir. 1970), *cert. denied*, 402 U.S. 932 (1971) and discussion of the case in Redish and Phillips, *Erie and the Rules of Decision Act: In Search of the Appropriate Dilemma*, 91 HARV. L. REV. 356, 378-80, 391-92 n.189 (1977). That question is neither presented nor implicated in the case before the Court.

the government acquired the land. State law has always had a singular importance with respect to real property matters, and the Court of Appeals had accepted application of the Louisiana rule, finding that it was nondiscriminatory with respect to the United States as a party to a land transaction. *Id.* at 584-85. In his opinion reversing that judgment, the Chief Justice observed:

> . . . The Court of Appeals['] . . . opinion seems to say that state law governs this land acquisition because, at bottom, it is an "ordinary" "local" land transaction to which the United States happens to be a party. The suggestion is that this Court's decision in *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), compels application of state law here because the Rules of Decisions Act, 28 U.S.C. § 1652, requires application of state law in the absence of an explicit congressional command to the contrary. We disagree. The federal jurisdictional grant over suits brought by the United States is not in itself a mandate for applying federal law in all circumstances. This principle follows from *Erie* itself, where, although the federal courts had jurisdiction over diversity cases, we held that the federal courts did not possess the power to develop a concomitant body of general federal law. . . . It is true, too, that "[t]he great body of law in this country which controls acquisition, transmission, and transfer of property, and defines the rights of its owners in relation to the state or to private parties, is found in the statutes and decisions of the state." *Davies Warehouse Co.* v. *Bowles*, 321 U.S. 144, 155 (1944). Even when federal general law was in its heyday, an exception was carved out for local laws of real property. . . .
>
> Despite this arguable basis for its reasoning the Court of Appeals in the instant case seems not to have recognized that this land acquisition, like that in *Leiter Minerals*, is one arising from and bearing heavily upon a federal regulatory program. Here,

the choice-of law task is a federal task for federal courts, as defined by *Clearfield Trust Co.* v. *United States*, 318 U.S. 363 (1943). Since *Erie*, and as a corollary of that decision, we have consistently acted on the assumption that dealings which may be "ordinary" or "local" as between private citizens raise serious questions of national sovereignty when they arise in the context of a specific constitutional or statutory provision; particularly is this so when transactions undertaken by the Federal Government are involved, as in this case. In such cases, the Constitution or Acts of Congress "require" otherwise than that state law govern of its own force.

There will often be no specific federal legislation governing a particular transaction to which the United States is a party; here, for example, no provision of the Migratory Bird Conservation Act guides us to choose state or federal law in interpreting federal land acquisition agreements under the Act. But silence on that score in federal legislation is no reason for limiting the reach of federal law, as the Court of Appeals thought in *Leiter Minerals*. To the contrary, the inevitable incompleteness presented by all legislation means that interstitial federal lawmaking is a basic responsibility of the federal courts. "At the very least, effective Constitutionalism requires recognition of power in the federal courts to declare, as a matter of common law or 'judicial legislation,' rules which may be necessary to fill in interstitially or otherwise effectuate the statutory patterns enacted in the large by Congress. . . ."

Id. at 590-93 (footnotes omitted).[18]

[18] "[S]tate law is applied [under the Rules of Decision Act] only because it supplements and fulfills federal policy, and the ultimate question is what federal policy requires." *International Union* v. *Hoosier Cardinal Corp.*, 383 U.S. 696, 709 (1966) (White, J., dissenting).

That it is *federal* rights protected, and *federal* remedies afforded, by 42 U.S.C. § 1983, is beyond dispute. *See, e.g., Steffel* v. *Thompson*, 415 U.S. 452 (1974); *Lynch* v. *Household Fin. Corp.*, 405 U.S. 538 (1972); *Mitchum* v. *Foster, supra; Monroe* v. *Pape, supra*, 365 U.S. at 196 (Harlan, J., concurring). The *federal* interests thus established by the Civil Rights Acts would, even in the absence of § 1988, therefore, have to be taken into account in deciding whether to apply state law in Civil Rights Acts suits. Accordingly there can be no doubt of the power of federal courts to disregard state law in such suits if that course is deemed necessary to "effectuate the statutory pattern enacted in the large by Congress," and we turn to a consideration of the circumstances in which the exercise of the power is appropriate.

II

In This Case Louisiana's Limited Survival Of Actions Statute Was Properly Not Applied Because To Do So Would Conflict With The Remedial And Deterrent Purposes Of The Federal Civil Rights Acts.

We have shown above that courts entertaining federal civil rights actions are not invariably required to follow the provisions of state law on matters as to which the federal Civil Rights Acts are silent. Accordingly, we contend, the judgment below must be sustained unless this Court determines that the courts below used the wrong standards to decide whether Louisiana's survival statute should be applied to this case. We proceed, therefore, to articulate *first*, the considerations relevant to the choice-of-law decision; *second*, the policies and purposes which underlie the federal Civil Rights Acts in general, and the Ku Klux Act of 1871 (42 U.S.C. § 1983) in particular; and *third*, the reasons why we believe the correct result was reached in this case.

A. *Factors bearing upon the choice of law.*

It is worth reiterating, as a preliminary matter, that the authority to apply or reject state law is presented under either § 1988 or the Rules of Decision Act only on an interstitial basis, where federal statutory law is incomplete *and* silent about the source of decisional rules to fill any gaps. Neither we nor this case invite the Court to sanction, as it has consistently refused to do, a *general* common law. Where federal statutes direct unconditionally—as neither § 1988 nor the Rules of Decision Act do—that state law is to be incorporated as federal law, that is the end of the matter; there is no room nor need for "interstitial" federal common law. *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971).[19]

Analysis of this Court's choice-of-law rulings reveals two general categories of facts and circumstances which are taken into account.[20] The first may be called the "nature of the national interest." This encompasses such matters as: the presence of the United States, or an agency of the United States, as a party;[21] whether the substantive questions in the lawsuit involve the validity or consequences of activities of the United States or its agencies;[22] whether the decision of the substantive ques-

[19] *Cf. Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240 (1975) (Congressional enactment of various specific authorizations for the award of attorneys' fees by federal courts, against background of general statutory limitation of power to award fees, precluded judicial adoption of broad "private attorney general" theory).

[20] ". . . whether state law is to be applied . . . 'necessarily is dependent upon a variety of considerations always relevant to the nature of the specific governmental interests and to the effects upon them of applying state laws.'" *United States* v. *Little Lake Misere Land Co., supra*, 412 U.S. at 595, quoting from *United States* v. *Standard Oil Co.*, 332 U.S. 301, 309-10 (1947).

[21] *E.g., Clearfield Trust Co.* v. *United States, supra.*

[22] *E.g., Hughes* v. *Washington*, 389 U.S. 290 (1967).

tions will likely have a wide effect upon the conduct of a national regulatory or assistance program;[23] whether the litigation itself has been explicitly or implicitly sanctioned by the Congress as a means of effectuating national policy,[24] etc.

In general, the "stronger" the federal interest, the less likely it is that state laws will be found to apply. This does not mean, however, that state law is barred from consideration. The presence of an important federal interest is usually stated to be sufficient to require that "federal law" be applied to the substance of the case, but even then, as this Court has said, "[i]n our choice of the applicable federal rule we have occasionally selected state law." *Clearfield Trust Co.* v. *United States, supra*, 318 U.S. at 367. In some cases this is justified on the assumption "that Congress has consented to application of state law . . . [a]nd in still others state law may furnish convenient solutions in no way inconsistent with adequate protection of the federal interest." *United States* v. *Standard Oil Co.*, 332 U.S. 301, 309 (1947).

The second set of factors relates to the impact of applying state law: both its impact upon the case at hand and upon the federal interests which are involved in and affected by it. Aspects of this inquiry include: the ability of the national government to anticipate and meet state law requirements in the normal operations of its programs;[25] the availability of alternative mechanisms to satisfy the federal interest which are unaffected by the state law (including their likely effectiveness and the access of the parties to them);[26] the degree to which

[23] *E.g., United States* v. *Little Lake Misere Land Co., supra*, 412 U.S. at 597.

[24] *E.g., Textile Workers Union* v. *Lincoln Mills, supra.*

[25] *E.g., United States* v. *Yazell, supra.*

[26] *See United States* v. *93.970 Acres of Land*, 360 U.S. 328 (1959).

application of state law would abort, rather than merely alter, proceedings in the pending lawsuit,[27] etc.

These variegated concerns underscore our earlier point that the choice of law determination is far from automatic or mechanical. Diverse results flow from rational analysis of competing values in these cases. Distinctions are often founded upon the intensity of the national interest and the effect of state law upon the national policy, as the following examples illustrate.

We consider first suits directly touching or implicating governmental activities. In *Clearfield Trust Co.* v. *United States*, *supra*, the Court concluded that the interest of the government in a uniform national definition of its rights and duties was so great that federal, and not state, law would be applied to its transactions in commercial paper. This interest was found to be much more attenuated in *Bank of America* v. *Parnell*, 352 U.S. 29 (1956) (a diversity case); since there the Court also viewed application of state law to *private* transactions in commercial paper as having little impact upon the federal government, it rejected the *Clearfield* doctrine.

Similarly, in *D'Oench Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), the Court inferred from various statutes a protective policy toward the federal agency involved in the case, which it held required the application of federal and not state law. But where no need for such special solicitude was evidenced in federal legislation (or the Constitution or treaties), state law rules were permitted to determine, for example, the tax liability of a national agency in *Reconstruction Fin. Corp.* v. *Beaver County*, 328 U.S. 204 (1946) and the availability of interest on tax payments improperly exacted from Indians, which the United States sued to recover in *Board of County Comm'rs* v. *United States*, 308 U.S. 343 (1939).

[27] *E.g.*, *McAllister* v. *Magnolia Petroleum Co.*, *supra*.

A like pattern obtains in litigation between private parties in which important federal interests become entangled. In *Sola Elec. Co.* v. *Jefferson Elec. Co.*, *supra* (a diversity action), this Court ruled that a state estoppel rule could not be given effect to prevent presentation of a defense of illegality under the Sherman Act. On the other hand, no important federal policy issues were affected by the application of state law to determine the relations of private parties under a federal mineral lease in *Wallis* v. *Pan American Petroleum Corp.*, 384 U.S. 63 (1966). Federal law was held to govern tort liability in *Francis* v. *Southern Pac. Co.*, 333 U.S. 445 (1948) by virtue of an implied Congressional approval of the prestatutory common law rule; and to prescribe available defenses in *Holmberg* v. *Armbrecht*, 327 U.S. 392 (1946) because the underlying claim was a federally created *equitable* right held not subject to state rules of limitations.[28]

Statutes of limitations cases form a distinct body of law, primarily because the impact of applying state limitations (if any) is ordinarily confined to the litigation,

[28] *Cf. Robinson* v. *Campbell*, *supra*. The law applied in suits brought pursuant to § 301 of the Taft-Hartley Act, 29 U.S.C. § 185, also illustrates the point well. In *Textile Workers Union* v. *Lincoln Mills*, *supra*, 353 U.S. at 456, this Court announced that federal law, "which the courts must fashion from the policy of our national labor laws," would be the substantive law applied in suits under § 301 to enforce agreements to arbitrate between labor unions and management. *Charles Dowd Box Co.* v. *Courtney*, 368 U.S. 502 (1961) allowed such suits to be brought in state, as well as federal, courts—but in such instances, the Court held that same Term in *Local 174* v. *Lucas Flour Co.*, 369 U.S. 95 (1962), federal law must be applied. Yet even in this area in which federal concerns seemed to be paramount, the Court has ruled that there is room for flexibility, for diverse state laws. State statutes of limitation, the Court said in *International Union* v. *Hoosier Cardinal Corp.*, 383 U.S. 696, 701-03 (1966), could be applied in § 301 suits because "[l]ack of uniformity in this area is . . . unlikely to frustrate in any important way the achievement of any significant goal of labor policy." *Id.* at 702.

and does not affect federal interests or ongoing federal programs. *See, e.g., Cope* v. *Anderson*, 331 U.S. 460, 463-64 (1947) (state limitations period would be applied to equitable action to enforce federally created assessments on shareholders of insolvent national bank, although commencement of period is question of federal law); *International Union* v. *Hoosier Cardinal Corp., supra* n. 28; *but see McAllister* v. *Magnolia Petroleum Co., supra* (state limitation period could not be applied to unseaworthiness claims where it was shorter than federal Jones Act period, since federal law requires that both claims be prosecuted in a single action).

These choice-of-law principles are applicable to suits brought under the federal Civil Rights Acts. As we discuss in the next section, these statutes create important federal interests, recognized by this Court's ruling in *Sullivan* v. *Little Hunting Park, supra*, 396 U.S. at 239, that "[c]ompensatory damages for deprivation of a federal right are governed by federal standards, as provided by Congress in 42 U.S.C. § 1988 . . . ." [29] *See Hodge* v. *Seiler*, 558 F.2d 284, 287-88 (5th Cir. 1977) (as a matter of federal law, at least nominal damages must be awarded for violation of § 1982 right); *Pollard* v. *United States*, 384 F. Supp. 304, 307 n.2 and accompanying text (M.D. Ala. 1974) (state limitations period applies, but in determining commencement of period, federal—not state—rule with respect to fraudulent concealment governs); *Ingram* v. *Steven Robert Corp., supra*, 547 F.2d at 1262 n.2 and accompanying text (distinguishing between state statutes of limitation and survival statutes

[29] *Compare J.I. Case Co.* v. *Borak, supra*, 377 U.S. at 434: "But we believe that the overriding federal law applicable here would, where the facts required, control the appropriateness of redress despite the provisions of state corporation law, for it 'is not uncommon for federal courts to fashion federal law where federal rights are concerned.' *Textile Workers* v. *Lincoln Mills* . . . ."

based upon their impact); [30] *Gore* v. *Turner*, 563 F.2d 159, 164 (5th Cir. 1977) (in § 1982 action, court should have awarded punitive damages based upon "evaluation of the nature of the conduct in question, the wisdom of some form of pecuniary punishment, and the advisability of a deterrent to future illegal conduct"); *Miller* v. *Smith*, 431 F. Supp. 821 (N.D. Tex. 1977) (state tolling rule would not be followed in § 1983 case if its application would be inconsistent with purposes underlying federal cause of action).

Thus, in our view, decision of this matter hardly involves a special rule for civil rights actions; rather, the courts below applied traditional choice-of-law principles to the facts, taking into account the broad remedial and deterrent purposes of the federal Civil Rights Acts and the extent to which application of Louisiana's survival statute would frustrate those purposes.

B. *The remedial-deterrent purposes of the Civil Rights Acts.*

Any elucidation of the purposes of the federal Civil Rights Acts, and in particular of the provision of the 1871 Ku Klux Act which is now codified as 42 U.S.C. § 1983, must begin with the fundamental proposition that § 1983 creates a cause of action separate and apart from any state law. While the same conduct may give rise to a state-law tort or other liability, that fact is purely coincidental to the § 1983 liability created by conduct under color of state law which deprives an individual of constitutional rights. In recognition of this principle, and of the Reconstruction Congresses' desire to provide, in the federal Civil Rights Acts, remedies which are independent of the state-created procedures to vindicate constitutional rights, this Court has consistently held that there is no exhaustion requirement in § 1983 actions. *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973); *Damico* v. *California*,

[30] *Cf. Burnett* v. *New York Cent. R.R. Co.*, 380 U.S. 424 (1965).

389 U.S. 416 (1967); *McNeese* v. *Board of Educ.*, 373 U.S. 668 (1963); *Monroe* v. *Pape*, *supra*. Hence, there is no anomaly in the circumstance that the malfeasor may be required to respond to the injured party separately in tort under state law and in a federal cause of action for deprivation of constitutional rights. That result flows ineluctably from the federal nature of our nation. As Mr. Justice Harlan said, concurring in *Monroe* v. *Pape*, *supra*, 365 U.S. at 196, "a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right."

This central characteristic of the federal Civil Rights Acts is closely related to the important federal interests which they are intended to protect, and which must be given effect in actions brought thereunder. They are, first, designed to afford complete justice (independent, as we have said, of any other remedy) to those whose constitutional rights have been denied by state officers. *See Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 231-32 (1970) (Brennan, J., concurring in part and dissenting in part).[31] Thus, for example, this Court has held that in civil rights actions, damages may be awarded irrespective of state law provisions, *Sullivan* v. *Little Hunting Park*, *supra*, and that injunctions against state court proceedings may issue notwithstanding 28 U.S.C. § 2283, *Mitchum* v. *Foster*, *supra*. *See also*, *Albemarle Paper Co.* v. *Moody*,

[31] As we pointed out in the Brief for the Lawyers' Committee for Civil Rights Under Law, et al., as Amici Curiae in No. 76-5416, *Jones* v. *Hildebrant* [hereinafter, "*Jones Amici* Brief"] (see pp. 2-3 *supra*), at 36-37, federal civil rights legislation is part of a tradition stretching back to *Marbury* v. *Madison*, *supra*, whereby American law has fashioned remedies adequate to compensate those who are deprived of what the Constitution and laws guarantee them.

supra n. 7. But these statutes do more than authorize relief.

The constitutional provisions protecting individuals (both the specific protections of the Bill of Rights made applicable to actions of the states by the Fourteenth Amendment and the more general provisions embodied in the equal protection and due process guarantees) are more than remedial. As integral parts of the organic law of our nation, they directly regulate primary conduct. With respect to the conduct of state officials, the federal Civil Rights Acts establish *private litigation* as a principal instrument by which these constitutional provisions are to be implemented.[32] Hence that litigation must not only afford redress to those whose constitutional rights are invaded. If it is to be truly effective as a vehicle of Fourteenth Amendment policy, its sanctions must also be sufficiently credible and efficient to serve as a practical deterrent to illegal conduct.[33]

[32] "The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardian of the people's federal rights—to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'" *Mitchum* v. *Foster*, *supra*, 407 U.S. at 242, quoting from *Ex parte Virginia*, 100 U.S. 339, 346 (1880). As the Court explained in *District of Columbia* v. *Carter*, 409 U.S. 418, 427 (1973):

> To the Reconstruction Congress, the need for some form of federal intervention was clear. It was equally clear, however, that Congress had neither the means nor the authority to exert any direct control, on a day-to-day basis, over the actions of state officials. The solution chosen was to involve the federal judiciary.

[33] As stated in Niles, *Civil Actions for Damages Under the Federal Civil Rights Statutes*, 45 TEX. L. REV. 1015, 1026 (1967):

> [T]he basic policy behind tort law is compensation for physical harm to an individual's person or property by shifting losses from the one injured to the one perpetrating the injury, while the underlying policy of the civil rights statutes is quite different. The legislative intent behind these statutes is not entirely certain since other provisions of the Act of 1871 received

The Reconstruction Congresses hoped that successful lawsuits for violation of constitutional rights, which they were authorizing to be brought in the federal courts, would not only compensate the victims of unconstitutional conduct but also provide effective warning to state officials inclined to disregard the commands of the Thirteenth and Fourteenth Amendments. The concept was well established in the common law. For example, in *Barry* v. *Edmunds*, 116 U.S. 550 (1886), one of the *Virginia Coupon Cases*, the Court sustained federal question jurisdiction in a suit against a local tax collector under the Contract Clause because punitive damages, allowable as a part of the federal common law applicable to the suit, might exceed the minimum jurisdictional amount. In the course of its opinion, this Court discussed English Cases recognizing the deterrence value of actions against officials who misuse their powers (*id.* at 566):

> The case of *Beardmore* v. *Carrington*, 2 Wils. 244, was an action of trespass and false imprisonment against the defendants, who were four of the King's messengers in ordinary. They justified the alleged

far more attention in congressional debate than did those that eventually became sections 1983, 1985, and 1986. One purpose of the Act apparently was to provide a federal forum for rights that the disorganized Southern state governments were not protecting adequately. It seems clear, however, from the statements of a few legislators, the title of the Act itself, and the circumstances surrounding its passage that the Act's primary purpose was to enforce the fourteenth amendment by providing a positive, punitive civil remedy for acts of racial discrimination. Thus an award of damages would depend not on the common-law test of whether a plaintiff had suffered a measurable physical or economic injury, but on whether the defendant's conduct came within the scope of actions that the statutes were intended to penalize. While traditional tort law damages rules may be appropriate to accomplish some of the civil rights statutes' purposes, the tort-law rules do no [*sic*] allow full realization of those purposes because of their emphasis upon loss-shifting rather than upon punishment and deterrence. [footnotes omitted]

> trespass under a warrant of the Earl of Halifax, then one of the principal Secretaries of State, requiring them to arrest the plaintiff as the author of some seditious libels and to seize his books and papers. There was a verdict for the plaintiff for £1,000 damages, and a motion for a new trial on the ground that the damages were excessive. The court (Pratt, afterwards Lord Camden, being *Lord Chief Justice*) said: "Can we say that £1,000 are monstrous damages as against him who has granted an illegal warrant to a messenger, who enters into a man's house and prys into all his secret and private affairs, and carries him from his house and business and imprisons him for six days? It is an unlawful power assumed by a great minister of state. Can anybody say that a guinea *per diem* is sufficient damages in this extraordinary case, which concerns the liberty of every one of the King's subjects? We cannot say the damages of £1,000 are erroneous." The dignity and value of the right assailed, and the power and authority of the source from which the assault proceeds, are elements to be considered in the computation of damages, if they are to be, not only compensation for the direct loss inflicted, but a remedy and prevention for the greater wrong and injury involved in the apprehension of its repetition.

The combination of remedial and deterrent goals in federal statutes creating causes of action is not uncommon. Recently construing such a statute (the Clayton Act), this Court allowed foreign governments to bring actions under the law in order to preserve "the maximum deterrent effect of treble damages upon all potential violators." *Pfizer, Inc.* v. *Government of India*, 46 U.S.L.W. 4073, 4075 (January 11, 1978) (footnote omitted).[34]

[34] *See also Gore* v. *Turner*, *supra*, 563 F.2d at 164: "Because of the seriousness of the defendant's conduct, this Court directs the district court to award punitive damages to deter the defendant

Thus, we perceive the federal Civil Rights Acts, passed in the exercise of Congress' authority under the Thirteenth and Fourteenth Amendments, to create two principle *federal interests* in lawsuits brought under them: first, that individuals denied their constitutional rights by state officials or others acting under color of state law be fully compensated, and second, that the federal remedy be maximally effective in order to deter those wielding state power from using it in contravention of federal constitutional guarantees.

C. *Abatement of this action by reason of Clay Shaw's untimely death would be inconsistent with Congress' purposes in creating the § 1983 cause of action.*

We come, ultimately, to the precise issue in this case: whether the lower courts correctly applied the factors identified above, in relation to the purposes of the federal Civil Rights Acts delineated above, when they concluded that the provisions of Louisiana's survival statute should not cause this action to abate. We submit that they did.

The entire discussion heretofore establishes, we believe, that there is no simplistic answer to this question. Courts

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from such conduct in the future"; *Rodriguez* v. *Taylor*, No. 76-2609 (3d Cir., December 27, 1977), slip op. at p. 9:

> The "amounts owing" to a victim of age discrimination are not further defined by statute. Thus, the scope of pecuniary relief available under the ADEA must be ascertained from examination of the whole statutory scheme. Damage standards should effectuate the purposes of antidiscrimination statutes. *See generally Rogers* v. *Exxon Research & Engineering Co.*, 550 F.2d 834, 839-42 (3d Cir. 1977).
>
> Monetary awards exacted from employers who practice unlawful discrimination serve two primary functions. First, the prospect of economic penalties more certainly deters illegal employment practice than does exposure to injunctive relief or prospective equitable remedies such as reinstatement. Second, economic exactions recompense individuals for injuries inflicted by employers' discriminatory conduct.

are no more precluded from rejecting state survival statutes because the federal Civil Rights Acts are silent on the subject (*see* Pet. Br. at 10-11) than they are precluded from awarding damages because the Acts do not expressly mention them. *Sullivan* v. *Little Hunting Park, supra.* Nor does the fact that 42 U.S.C. § 1986 contains a survival provision establish any congressional policy with respect to survival of other civil rights suits. (*See* Pet. Br. at 11, 13, 26.)[35] Rather, the task is to determine how the federal and individual interests may best be accommodated.

Unlike statutes of limitations, whose purpose is to provide assurance that one will not be held to answer for conduct long past, and which therefore create cognizable interests in persons who may be made parties defendant in federal civil rights actions,[36] survival statutes (at least as they arise in this case) serve no interest in repose: the action has already been brought and defendants called upon to answer for their conduct.[37] Abate-

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[35] As we have demonstrated in the *Jones Amici* Brief, at pp. 24-31, even if the legislative history surrounding rejection of the Sherman Amendment and passage of § 1986's predecessor were much clearer, it would be more than the process of implication can bear to view § 1986 as even an indication that survival of civil rights actions is inconsistent with congressional intent. Petitioner seems not to recognize that this logic would invalidate decisions such as *Brazier* v. *Cherry, supra*, and *Pritchard* v. *Smith, supra*, cases with which he does not quarrel.

[36] Even with respect to such matters, courts have employed federal tolling rules consistent with the purposes underlying the Civil Rights Acts to avoid injustice which would result from applying state statutes of limitations. *E.g., Mizell* v. *North Broward Hosp. Dist.*, 427 F.2d 468, 474 (5th Cir. 1970); *Pollard* v. *United States, supra; see also Miller* v. *Smith, supra* (state tolling rule would not be applied to sustain timeliness of federal suit since court construed federal policy to require prompt resort to judicial remedy).

[37] For purposes of the decision in this case, the allegations of the complaint that Shaw's constitutional rights were violated must be taken as true. Application of the procedural rule for which Peti-

ment of the litigation before trial because of the death of the plaintiff cuts off all opportunity to prove the claim. Whatever may be the justification for allowing this result in litigation to enforce state-created tort interests (*see* note 33 *supra*), there is no adequate reason to permit the vindication of constitutional rights, and the deterrence of unconstitutional conduct, to be impeded because of the death of one who claimed denial of his rights. Such a result is wholly inconsistent with the purposes of the federal Civil Rights Acts.

In our *Jones Amici* Brief (*see* note 31 *supra*), at pp. 18-36, we showed that the courts are authorized to entertain § 1983 wrongful death suits involving alleged unconstitutional police misconduct or brutality without regard to the specific provisions of state statutes—although § 1988 permits "borrowing" those statutes if they further the purposes of the federal cause of action. That conclusion flows, as we demonstrated, from the broad remedial and deterrent purposes of the federal Civil Rights Acts. We also argued (pp. 36-44) that restrictive damages limitations of state wrongful death laws do not bind even those courts which "borrow" the statutes in § 1983 claims, again because such limitations are inconsistent with the "complete justice" theme of the Reconstruction statutes. The present case involves an even harsher result than in *Jones*. There, if Mrs. Jones had brought an action to recover damages for the injuries to and death of her son,[38] she could at least have recovered compensation for any actual pecuniary losses, up to a maximum of $45,000. *See Jones Amici* Brief, p. 5. Here, whether or not the Petitioner and other defendants in the action conspired to deprive Shaw of his constitutional rights, all chance to vindicate those rights or to prove consequential

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tioner contends would cause dismissal of civil rights actions without regard to their underlying merit.

[38] *See* note 2 *supra*.

losses would be barred by the fortuitous circumstance of Shaw's death.

The rule advanced by Petitioner would not be limited to cases in which death was apparently unrelated to the actions constituting a deprivation of constitutional rights (*see* Pet. Br. at 8 n.3). It would apply equally to an individual who was brutally beaten to death by state officials, but who did not happen to be survived by "spouse, children, parents, [o]r siblings." The opportunity for that individual's estate—or (indirectly) for a creditor of the estate—to show that recoverable loss resulted from that beating would be forever extinguished if courts in § 1983 suits may not displace a state survival statute like Louisiana's. (As one court has said, this result "would encourage officers not to stop after they had injured but to be certain to kill." *Davis* v. *Johnson*, *supra*, 138 F. Supp. at 574.) Consider the following hypothetical situation, slightly different from the facts here but, we submit, entirely plausible:

If Clay Shaw had been severely beaten, without cause, by the defendants; had survived for six months in the Intensive Care Unit of a New Orleans hospital, drifting in and out of a coma; had authorized his attorney to file a § 1983 damages action against the defendants during a conversation while in the hospital, and that suit was promptly filed; had incurred hospital and medical charges of more than $150,000 because of extraordinary efforts made to save his life; had executed a valid will leaving his residuary estate to an orphaned nephew for the latter's college education; but had not been survived by a spouse, child, parent or sibling; even then, under Petitioner's view of the applicable law, Shaw's § 1983 damage suit would abate. The anticipated bequest to his nephew, and the nephew's college education, might vanish. And if the estate were insufficient, the hospital and doctors might

have no way of being paid for their services. But the point is not whether a particular kind of potential claimant with a particular kind of loss exists; violations of constitutional rights harm interests shared by everyone. The most serious consequence of abatement, for § 1983 purposes, is that defendants might escape any liability for their unconstitutional actions unless the United States brought criminal charges against them.

We respectfully submit that these facts are neither far-fetched nor materially different from the case at bar. Clay Shaw brought this action before his death, alleging that the defendants (including Petitioner) conspired to deprive him of his constitutional rights. He alleged that because of the defendants' actions he was required to spend considerable sums defending himself against groundless prosecutions on a charge of seeking to murder President John F. Kennedy. He did execute a valid will naming a residuary legatee, and he did die without being survived by a spouse, child, parent, or sibling. Surely there is no better reason for abating Shaw's attempt to vindicate his constitutional rights under these circumstances than there would be if he had died from a beating allegedly administered by the defendants. As a matter of federal policy it is equally important in the former instance that the action survive, since federal judicial intervention to halt ongoing state proceedings such as those initiated by defendant Garrison is so rarely available. *Younger* v. *Harris*, *supra*; *Samuels* v. *Mackell*, *supra*; *Shaw* v. *Garrison*, *supra*, 293 F. Supp. 937 (E.D. La.), *aff'd* 393 U.S. 220 (1968).

Petitioner also suggests that the courts below erred in failing to adopt, as the federal common law to be applied in this case, various federal survival statutes in other fields which are similar to Louisiana's (Pet. Br. at 22). In this respect, Petitioner's argument at least addresses

the proper question in the case. However, once again we believe that consideration of the purposes of the federal Civil Rights Acts dictates affirmance of the judgment below.

It is by no means self-evident that the survival provisions of the Federal Employers Liability Act, the Longshoremen's and Harbor Workers' Compensation Act, and the Death on the High Seas Act, should be applied in federal civil rights cases. In *Complaint of Cambria S.S. Co.*, 505 F.2d 517 (6th Cir. 1974), *cert. denied*, 420 U.S. 975 (1975), cited by Petitioner,[39] the court did hold that neither a decedent's estate nor a non-dependent brother could bring the wrongful death admiralty action which this Court created in *Moragne* v. *States Marine Lines*, *supra*. However, the Sixth Circuit expressly rejected the argument that it should "simply borrow the schedule of beneficiaries from the Death on the High Seas Act." Instead, the court "endeavored . . . to develop a uniform body of federal law, neither borrowing automatically from federal statutory provisions, nor applying any particular state law." *Id.*, 505 F.2d at 521. The court reviewed the holdings in *Moragne* and *Sea-Land Services* v. *Gaudet*, 414 U.S. 573 (1974), and concluded that "the liberal and humanitarian character of maritime proceedings as expressed in *Moragne* and *Gaudet*, *supra*, contemplates solicitude for dependents, not inanimate estates." *Id.* at 523. Similarly, the court said, "[t]he mere accident of blood relationship with nothing more does not itself call for that special solicitude which the maritime law holds for those injured within its jurisdiction." *Id.* at 525. The Sixth Circuit declined to permit the estate to sue, as would have been permitted by some state laws, because this "fundamentally punitive approach is inconsistent with the expressed compensatory philosophy of the maritime law." *Id.* at 522.

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[39] Pet. Br. at 24.

This approach leads to different results in the instant case. As we have previously noted, the federal Civil Rights Acts have a twofold purpose: compensation for the victim and deterrence/punishment for the wrongdoer. These statutes are consistent with the common law tradition authorizing the award of punitive damages for official misconduct. *See* pp. 32-33 *supra*. There is no reason to cut off the right of a decedent's estate to maintain an action under these statutes just because the plaintiff is survived by no dependent beneficiaries. Furthermore, the loss-shifting rationale of tort and maritime law is designed to shift the burden of economic inquiry for negligence (or unseaworthiness) in an area of activity which is itself legal, and in which accidents and injury may, unfortunately, be expected to occur with regularity.[40] The goal of the federal Civil Rights Act, however, is to assure that unconstitutional conduct (itself clearly unlawful) does not occur at all, and that individuals injured by its occurrence are compensated. These ends are ill-served by application of Louisiana's survival statute to this action, and the courts below acted properly in allowing the suit to continue with the substitution of Shaw's executor as a plaintiff.

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[40] *See* note 33 *supra*.

CONCLUSION

For the foregoing reasons, *amicus* respectfully submits that the judgment below should be affirmed.

Respectfully submitted,

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